REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

AND IN

THE BAIL COURT,

WITH

TABLE OF THE NAMES OF CASES

AND

DIGEST OF THE PRINCIPAL MATTERS.

BY

S. B. HARRISON AND F. L. WOLLASTON, ESQRS.

OF THE MIDDLE TEMPLE,

BARRISTERS AT LAW.

FROM HILARY TERM, FIFTH WILL. IV. 1835,

TO HILARY TERM, SIXTH WILL. IV. 1836,

BOTH INCLUSIVE.

LONDON:

HENRY BUTTERWORTH,

Law Bookseller and Publisher,

7, FLEET STREET;

AND RICHARD PHENEY, 89, CHANCERY LANE.

1836.

LONDON :
C. ROWORTH AND SONS, BELL-YARD,
TEMPLE BAR.

JUDGES

OF THE

COURT OF KING'S BENCH,

During the Period of these Reports.

The Right Hon. THOMAS Lord DENMAN, C. J.
The Hon. Sir JOSEPH LITTLEDALE, Knt.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEYS GENERAL.

Sir FREDERICK POLLOCK, Knt.
Sir JOHN CAMPBELL, Knt.

SOLICITORS GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.
Sir ROBERT MOUNSEY ROLFE, Knt.

MEMORANDA.

1835.—On the first day of *Hilary* Term, the following Gentlemen, having been appointed His Majesty's Counsel, were called within the bar: William Burge, Daniel Wakefield, Henry John Shepherd, Christopher Temple, Walter Skirrow, John Miller, C. H. Barber, George Spence, Thomas Joshua Platt, Fitzroy Kelly, Richard Torin Kindersley, Edward Jacob, and James Wigram, Esquires.

On the same day, the Honourable Sir *William Elias Taunton*, Knt., one of the Judges of this Court, died. He was succeeded by *John Taylor Coleridge*, Esquire, Serjeant at Law, who was afterwards knighted.

On the 23d of *April*, Lord *Lyndhurst* resigned the Great Seal, which was put in commission. The Commissioners were, the Right Honourable Sir *Charles Christopher Pepys*, Master of the Rolls; the Right Honourable Sir *Lancelot Shadwell*, Vice Chancellor of *England*; and the Right Honourable Sir *J. B. Bosanquet*, Knt., one of the Judges of the Court of Common Pleas.

During *Easter* Term, the Right Honourable Sir *E. B. Sugden*, Knt., resigned the office of Lord Chancellor of Ireland. He was succeeded by the Right Honourable Lord *Plunkett*. In the same Term, Sir *F. Pollock*, Knt., resigned the office of Attorney-General, and he was succeeded by Sir *John Campbell*, Knt. Sir *Wm. W. Follett*, Knt. at the same time resigned the office of Solicitor-General, and was succeeded by *R. M. Rolfe*, Esq. one of His Majesty's Counsel, who was afterwards knighted.

In the same Term *Basil Montagu*, Esq., *Robert Alexander*, Esq., and *Thomas Starkie*, Esq., of Lincoln's Inn, having been appointed His Majesty's Counsel, were called within the bar.

1836.—In the early part of *Hilary* Term, the Lords Commissioners resigned the Great Seal, and the Right Honourable Sir *C. C. Pepys*, Knt., Master of the Rolls, was appointed to the office of Lord High Chancellor, and was created a Peer, by the title of Baron *Cottenham*, of *Cottenham*, in the county of *Cambridge*.

Henry Bickersteth, Esq., one of His Majesty's Counsel, was also appointed Master of the Rolls, and was created a Peer, by the title of Baron *Langdale*, of *Langdale*, in the county of *Westmoreland*.

NAMES OF CASES

REPORTED IN THIS VOLUME.

DOE d. SPILSBURY and an^r^. *v.* BURDETT and or^s^.

EJECTMENT for estates in the several parishes of *Etwall*, *Willington*, *Repton*, and *Barrow-upon-Trent*, in the county of *Derby*, brought upon the several demises of *Francis Ward Spilsbury* and *Lucas Ward Spilsbury*, against Sir *Francis Burdett*, *William Jones Burdett*, *Frances Burdett*, *William Horobin*, *John Wilson*, and *Anthony Harding*. A marriage settlement, dated the 4th and 5th *December*, 1787, was entered into on the marriage of *William Augustus Skynner* with *Lydia Henning Ward*, by which a power of appointment was given to Miss *Ward*, to be exercised by her will executed and attested, as by the power required. By her will, dated 12th *September*, 1789, she assumed to exercise the power of appointment in favour of Mr. *Skynner*; from whom, by divers conveyances, the several defendants claimed. The lessors of the plaintiff claimed under the ultimate limitations in the settlement, on the ground that the power was not effectually exercised by the will. At the trial at the *Lent* assizes 1834 at *Derby*, before *Tindal*, C. J., a verdict was found for the plaintiff, subject to the opinion of the Court on a special case, which stated (amongst others) the following facts:—By the settlement, the estates were conveyed to the use and behoof of such person and persons, and for such estate and estates, upon such trusts, and to and for such ends, intents, and purposes, as she the said *Lydia Henning Ward*, whether covert or sole, and notwithstanding her present intended or any future coverture, by her last will and testament in writing, or any writing purporting to be, or in the nature of her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses, should give, devise, direct, limit, or appoint; and for want of such gift, devise, direction, limitation, or appointment, and as to such part or parts thereof, whereof there should be no such gift, devise, direction, limitation, or appointment, then over.

Lydia Henning Skynner died on the 30th *September*, 1789, in the lifetime of her husband *William Augustus Skynner*, leaving no child or children her surviving. She left at her death an instrument in writing, purporting to be her last will and testament, dated 12th *September*, 1789, of which the following is a fac simile copy:—

" I, *Lydia Henning Skynner*, wife of *William Augustus Skynner*, Esq., of *Gould Green*, in the parish of *Hillingdon*, in the county of *Middlesex*, do publish and declare this to be my last will and testament.

" I appoint my beloved husband, *William Augustus Skynner*, my executor, and my beloved mother, *Lydia Ward*, executrix with him. I give to my beloved mother, *Lydia Ward*, for her natural life, the rents, issues, and profits of the messuage, farm, closes, lands, and hereditaments at *Etwall*, *Twyford*, and *Stenson*, in the county of *Derby*, and after her death to go to my beloved husband, *William Augustus Skynner*, his heirs, executors, administrators, and assigns, absolutely for ever.

" I give to my beloved cousins hereinafter mentioned, after the decease of the said *William Augustus Skynner*, to be paid out of the two thousand two hundred pounds New *South Sea* Annuities, now standing in trust in the names of *Lucas Spilsbury*, Esq., of *Bawtry*, in the county of *York*, *Joseph*

A power was given to appoint by " last will and testament in writing, or any writing purporting to be, or in the nature of a last will and testament, or by any codicil or codicils thereto, to be by the appointor signed, sealed, and published in the presence of and attested by three or more credible witnesses." A will was made. At the commencement was a declaration by the testatrix, that she did publish and declare it to be her last will and testament. At the end, after a similar declaration, it proceeded, " In witness whereof, I have set my hand and seal." Then followed her name and seal, and after the word " witness," the names of three witnesses:— *Held*, that the will was a good execution of the power, though it was objected that the attestation ought in terms to have expressed that the will was executed in the presence of the witnesses.

King's Bench.

Doe dem. Spilsbury v. Burdett.

Amphlett, Esq., of *Dudley*, in the county of *Leicester*; the Rev. *Charles Egerton*, Clerk, Rector of *Washington*, in the county and diocese of *Durham*; and *John Hollingworth*, of *Threadneedle Street*, *London*, Esq.: that is to say, 1000*l.* New *South Sea* Annuities, to be equally divided among the five children of *Nicolas Martyn*, Esq, of *Watford*, in the county of *Herts*. The other thousand to be divided between the four children of the Rev. *Barnard Fowler*, of *Wormley*, in the county of *Herts*; and the 200*l.* to be divided, share and share alike, between the four children of *John Hollingworth*, banker, *Threadneedle Street*, *London*.

"And as to all the rest and residue of my estates, real and personal, whatsoever and wheresoever, or of what nature, kind, or quality the same may be or consist of at the time of my decease, and entitled to hereafter, and not hereinbefore disposed of,

"I give, devise, and bequeath the same, and every part and parcel thereof, unto my beloved husband, *William Augustus Skynner*, Esq., his heirs, executors, administrators, and assigns, absolutely for ever; and hereby revoking all former wills and codicils,

"I declare this only to be my last will and testament.

"In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of *September*, in the year of our Lord one thousand seven hundred and eighty-nine.

"Witness, *Charles Ball*,
Elizabeth Ball,
Ann Ball."

"*Lydia Henning Skynner*." (L. S.)

Ann Ball, one of the three witnesses, is still alive, and was not examined at the trial.

At the death of the said *Lydia Henning Skynner*, her uncle, *Benjamin Ward*, was her heir at law.

On the 18th *November*, 1789, a bill in Chancery was filed by the said *William Augustus Skynner*, (executor and devisee of his late wife,) and *Lydia Ward*, (her mother, and also executrix of and devisee named in her said will,) against the said *Benjamin Ward* and the trustees under the said settlement of the 4th and 5th *December*, 1787, praying to be at liberty to examine the witnesses to the said will, in order that their testimony might be perpetuated and preserved.

On the 2d *March*, 1790, the said *Benjamin Ward* put in his answer to the said bill, referring the plaintiffs to such proof of the due execution and attestation of the said will as they should be able to make; and in case it should appear not to be so executed and attested, claiming as heir at law.

On the 26th *March*, 1790, the depositions of *Charles Ball* and *Elizabeth Ball*, as to the execution of the said will, were filed in the said suit, and were, on the 20th *February*, 1834, ordered by the Vice-Chancellor to be published on a bill of revivor. Those depositions contain, amongst other things, that the witnesses examined were severally subscribing witnesses to the execution of the said will of the said *Lydia Henning Skynner*, and that they did severally see her sign, seal, publish, and declare the same as and for her last will and testament; and that each of them, the said *Charles Ball*, and *Elizabeth Ball*, and *Ann Ball*, were then also present, and were the subscribing witnesses thereto. No final order or decree was made in that suit.

One of the questions to be argued was, whether the instrument bearing date the 12th *September*, 1789, and appearing to be executed as above is expressed, was a due execution of the power, applicable to the estates sought to be recovered by the ejectment, and contained in the marriage settlement of *Lydia Henning Skynner*.

Preston (with whom were *Balguy*, *Adams*, Serjt., *N. R. Clarke*, and *Daniel*,) for the plaintiff.—The power requires the instrument to be "signed, sealed, and published in the presence of and attested by three or more credible witnesses." All these facts cannot be inferred, nor can they be taken on the statement of the testatrix herself. In *Stanhope* v. *Keir* (*a*) it was held, that where a power was to be executed by a will signed and published in the presence of and attested by three witnesses, a will concluding with this declaration "this is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested. In *Moodie* v. *Reid* (*b*), the same principle was adopted by the Court of Common Pleas; and *Gibbs*, C. J. expressly said there, that it is established "that the witnesses must attest every thing that is necessary for the execution of the power." That case had previously been before the Court of Chancery, and is reported under the same name (*c*). The Vice-Chancellor said, "In the argument in this case two questions have arisen; first, whether the power is well executed; secondly, whether, if the execution is defective, it can be relieved against in equity?" He then expressed his opinion, that if the power was not well executed, a Court of Equity could not relieve, and he sent the first question for the decision of the Court of Common Pleas. In that Court it was decided in the manner already stated. In *Doe* d. *Hotchkiss* v. *Pierce* (*d*) it was held, that a defective attestation of the execution of a power cannot be supplied by parol evidence of the attesting witness given on a trial; and, with regard to the attestation in that case, the Court held it to be defective. The power there was a power to appoint by deed or writing under the donee's hand and seal, and attested by two or more credible witnesses. It was held to be ill pursued by a will apparently under the testator's hand and seal, which seal an attesting witness believed was affixed before execution and attestation; because the attestation did not notice the sealing as well as the signing. In *Doe* d. *Mansfield* v. *Peach* (*e*), the rule laid down in the cases already cited was carried to its full extent. The power there was to be executed in the presence of, and to be attested by two witnesses. The parties, by deed, signed, sealed, and delivered by them in the presence of two witnesses, made an appointment; but the attestation indorsed on the deed, and subscribed by the witnesses, only specified that it was sealed and delivered in their presence, but not that it was signed. The Court held, that this was not a due attestation as required by the power; and that a subsequent attestation by the witnesses, after the death of one of the appointors, certifying that the deed was signed as well as sealed and delivered in their presence, did not cure the defect in the original attestation. Lord *Ellenborough* in that case said (*f*), "It seems to us, that to make a due

(*a*) 2 Sim. & Stu. 37.
(*b*) 7 Taunt. 355.
(*c*) 1 Madd. 516.
(*d*) 6 Taunt. 402.
(*e*) 2 Maule & Selw. 576.
(*f*) Id. 581.

execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms." In the case of *Wright* v. *Wakeford* (*a*) it was held, that a power to trustees, with the consent of the cestui que trusts, testified by writing under their hands and seals, attested by two or more credible witnesses, is not well pursued, if the attestation merely says sealed and delivered in the presence of the two witnesses; and a sufficient attestation added many years afterwards will not supply the defect. That case had been argued in Chancery before Lord *Eldon* (*b*), who sent it to the Common Pleas. In *M'Queen* v. *Farquhar* (*c*), the deed purported to be signed, sealed, and executed in the presence of the witness; and, therefore, though the attestation applied only to the sealing and delivery, the signature was presumed. In *Wright* v. *Barlow* (*d*), a power to be executed under the hand and seal of a party, attested by two or more credible witnesses, was held not to be well executed by a deed signed, sealed, and delivered in the presence of two witnesses, but on which the attestation indorsed merely was "sealed and delivered" in their presence. The Court will not look to the body of the instrument, but to the form of the attestation, to see whether the power which relates to that attestation has been complied with. Presumption ought in all cases like the present to be carefully excluded. As to the point on the depositions: if any one of the witnesses is living, which is the fact here, that witness must be called; and the depositions of the dead witnesses cannot be used till the living witness has been examined. The evidence might be sufficient under the Statute of Frauds, but under the terms of this power it is not sufficient.

The *Solicitor-General* (Sir *W. Follett*) for the defendant, *John Wilson*.—The question is, whether this instrument is a valid execution of the power. The objection taken is, that on the face of the instrument the only expression used is "witness," and then come the three names. The argument is, that the attestation ought to have stated it to have been signed, sealed, declared, and published in the presence of the witnesses. It is not necessary that the parties should state more than that they were witnesses to it. All the cases cited are distinguishable from the present, and the Court will not be inclined to extend the doctrine against the justice of the case. In all the cases cited the attestation shows itself to be imperfect. Another distinction is, that this instrument, on the face of it, appears to possess all the requisites demanded by the power. The witnesses who put their names to it must be presumed to have attested all the formalities. It is also proved by the testimony of the witnesses, that the will was signed, sealed, and published in their presence. That this is the proper view of the execution of a power, the Court may see by reference to the Statute of Frauds. It is required by that statute, that "the devise of land must be in writing, signed by the party so devising the same, and be attested and subscribed in the presence of the said devisor by three or four credible witnesses." *Ellis* v. *Smith* (*e*) shows, that the signature of the testator in the presence of the witnesses is not always necessary. In that case the will was subscribed by three witnesses, before whom the testator declared it to be his will, but did not sign it; and

(*a*) 4 Taunt. 213.
(*b*) 17 Ves. jun. 454.
(*c*) 11 Ves. jur. 467.
(*d*) 3 Maule & Selw. 512.
(*e*) 1 Ves. jun. 11.

it was held that such declaration was sufficient. *Hands* v. *James* (*a*) carried the matter still further, for there it was a question whether, merely upon circumstances, without any positive proof, it should be left to the jury to determine whether the witnesses to a will (being all dead) set their names in the presence of the testator, and the Court held, that it could properly be left to the jury. In *Croft* v. *Pawlett* (*b*), the Court of King's Bench recognized, and acted upon the rule in *Hands* v. *James;* and that too, although the signing in the devisor's presence was not mentioned in the attestation. In *Brice* v. *Smith* (*c*), it was distinctly held, that on an attestation of a will of lands, it need not be stated that the witnesses subscribed their names in the presence of the testator. In *Westbeech* v. *Kennedy* (*d*) it was laid down, that on proving the execution of a will, actual signature by the devisor, in the presence of the three subscribing witnesses, is not required, if he declares it to be his last will and testament in their presence. This being the current of cases on the Statute of Frauds, the question then comes to the particular power in this case. There ought to be no distinction between the two classes of cases (*e*). The decision of the Court of Common Pleas in *Wright* v. *Wakeford,* upon which Lord *Eldon* acted without one word of comment, though with the dissent of the Lord Chief Justice, is the whole ground on which the other side proceeds. In the two cases of *Doe* d. *Mansfield* v. *Peach,* and *Wright* v. *Barlow,* the Court proceeded expressly upon the authority of *Wright* v. *Wakeford.* They were both cases in which the attestation expressed that the witnesses had seen one or two of the three required acts performed. That raised the argument *expressio unius est exclusio alterius,* which does not exist in this case. The case of *Stanhope* v. *Keir* was decided by the same judge who decided *Buller* v. *Burt* (*f*). It

(*a*) Comyns' Rep. 531.
(*b*) 2 Stra. 1109.
(*c*) Willes Rep. 1.
(*d*) 1 Ves. & Beam. 362.
(*e*) Sugd. Vend. & Purch. 243.

(*f*) A MS. report of this case, furnished by a learned counsel at the equity bar, was used. It was as follows:—Mrs. *Louisa Smith,* a married woman, was by settlement empowered to dispose of certain personal property, by any deed sealed and delivered in the presence of and attested by two witnesses. She made a disposition of part of that property in favour of the defendant, *Burt.* The instrument concluded with the following words:—"Signed and sealed at *Cotton* aforesaid, this 13th day of *September,* and in the year of our Lord 1813, by *L. Smith,* (L. S.) Witness, *John H. Burt, Hannah Bowles.*"

The plaintiffs, by their bill, alleged that the instrument had never been delivered, and that even if it had been delivered, it was not a due execution of the power.

The defendant *Burt,* who claimed under the appointment, swore that he believed that the instrument had been delivered by Mrs. *Smith* to his father, *J. H. Burt,* among whose papers it had been found.

The only question argued at the hearing was, whether the instrument was a due execution of the power.

Mr. *Rose* and Mr. *Lynch* for the plaintiffs.—It is now settled that the witnesses must attest every thing which is necessary for the due execution of the power; *Wright* v. *Wakeford,* (17 Ves. 454, 4 Taunt. 213); *Doe* v. *Pierce,* (6 Taunt. 402); *Doe* v. *Peach,* (2 M. & S. 576); *Wright* v. *Barlow,* (3 M. & S. 512,) 54 *Geo.* 3, c. 168. In the present case those requisites are sealing and delivering, and as the delivery is not mentioned either in the attestation, or the body of the deed, it is impossible to pretend that there is any attestation of the delivery. In *Moodie* v. *Reid,* (1 Mad. 516, and 7 Taunt. 355,) a power which was to be executed by will, signed and published in the presence of and attested by two witnesses, was held to be not well executed by a will which concluded with these words: "Signed by me, &c.," and was attested thus: "Witnesses, *A. B.* and *C. D.*" The same rule was followed in *Stanhope* v. *Kier,* (2 Sim. & Stu. 37.) In those two cases the attestation was deemed not sufficient, because it did not extend to the publication; and, for a like reason, it must be bad here, because it does not extend to the delivery.

Mr. *Treslove* and Mr. *Flather* for the defendant, *Burt.*—In *Moodie* v. *Reid* the decision proceeded on the ground that a will as such did not require publication; and

was there said, that if the witnesses put their names to an instrument after the word "witness," and the instrument appeared on the face of it to be well executed, that would be sufficient. The distinction between that case and *Stanhope* v. *Keir* is, that the Vice-Chancellor in the latter case said, that he could not assume that that which was right was done; but in the former he went a step further, and said that the Court could not hear witnesses to prove it. *Moodie* v. *Reid* turned on the effect of the word "published," and there was no statement either in the will or the attestation that it was published. There is a statement in this case that all the formalities were complied with, and it follows as a presumption of law, that these parties did witness the sealing, delivery, and publication. The first point contended for by the defendants in this case is, that it is not necessary in any case whatever that the parties required to attest an instrument should do more than put something upon the instrument amounting to a declaration that they should be able to identify it afterwards. That was formerly the rule laid down in cases arising on the Statute of Frauds, and ought to have been in all other cases which afterwards arose on wills and powers. But if the Court adopts any of the cases referred to on the other side, then a distinction arises on the ground of a defective form of attestation. If the declaration in the deed is sufficient, and the word "witness" only is used, then the last decision of the Master of the Rolls shows that it will be sufficient.

Sir *J. Campbell* for the defendants Sir *Francis Burdett*, *William Jones Burdett*, and *Frances Burdett*.—Where there is a general attestation, the witnesses must be supposed to attest all the acts that the testator says he has done. *Doe* d. *Mansfield* v. *Peach* proceeded on the maxim, that the expression of one thing is the exclusion of another, and is therefore inapplicable to the present case. In *Moodie* v. *Reid* there was no general attestation. In *Stanhope* v. *Keir* it was general, but the instrument itself omitted the statement of one particular requisite, so that if the Court should say that the attestation in this case is bad, it will be carrying the rule further than it has ever been carried before. In *Ward* v. *Swift* (*a*), a power of appointment was given to be executed by *M. S.*, by her will duly executed, and published

therefore that a general attestation could not be considered to include a phraseology which the nature of the instrument did not make essential. But an instrument purporting to be a deed is not a deed unless it be delivered; and if general words of attestation be annexed to it, they must be deemed to attest a circumstance which is essential to its existence as a deed. In *Wright* v. *Wakeford*, and the other cases of that class, the attestation specified the facts which were attested, namely, sealing and delivering, but omitted to specify signing. They furnish a rule, therefore, only where the memorandum of attestation specifies the precise act which the witnesses attest, and they have no application to attestations in which the names of the witnesses are merely preceded by "witness," "witnessed," "attested," or some similar phrase.

The Master of the Rolls.—The attestation of the witnesses being considered as a part of the appointment, it follows that where the word "witness" without more is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed. Here, in the body of the deed, it is stated to be signed and sealed, but it is not stated to have been delivered; and as the general word "witness" can affirm no more than the deed states, there is in this case no attestation of that essential part of what is required for the due exercise of the power—the delivery of the deed. The power, therefore, is not well executed.

The case of *Moodie* v. *Reid*, (1 Mad. 516,) is in principle a complete authority for this decision; the difference in circumstances between the two cases is only that there the word "published" was omitted in the body of the deed, and here the omission is of the word "delivered."

(*a*) 2 Tyr. 122; S. C. 1 Cromp. & Mees. 171.

under her hand and seal, in the presence of and attested by three or more witnesses. The will concluded and was attested in this form: " In witness whereof I have set my hand and seal this 5th day of *August*, 1801, in the presence of the under-written *Mary Swift*, (L. s.);" and then there followed the attestation, " Signed, sealed, and delivered, this 5th day of *August*, 1801, as the last will and testament of the said testatrix, *M. S.*, who, in her presence, and in the presence of each other, have put our names as witnesses thereof;" then followed the names of the witnesses. The Court of Exchequer held that the power was well executed. That case was decided on the same principle as *Buller* v. *Burt*, and it must be taken as an authority governing the present case.

Waddington for the defendant *Anthony Harding*.—It must be contended on the other side, that a general attestation is no attestation at all, for the word " witness" cannot apply to any one thing, if it does not apply to all of them. Reference may be made to the instrument, and if it is, then there is enough to satisfy the Court that the power in the present instance has been well executed. In *Sugden* on Powers (*a*), in reference to attestations of this sort, it is said, that if in the memorandum the witness merely uses the expression " witnessed," " attested," or the like, he is not precluded by this general attestation from proving that he witnessed all the facts which are necessary.

G. T. White for the defendant *William Horobin*.—The depositions were properly admissible in evidence. They were taken in a suit to perpetuate testimony. In *Williams* v. *Williams* (*b*), depositions taken in an old suit to perpetuate testimony, where the plaintiff and defendant were privies, were held receivable in evidence in an action to which the same plaintiff and defendant were parties. In *Ward* v. *Swift*, Lord *Lyndhurst*'s only difficulty appears to have arisen from the evident omission of some words before the words " who in her presence and in the presence of each other." There is no such difficulty here, and the principle of that case is decisive in favour of the defendants in the present.

Preston was heard in reply.

Lord Denman, C. J. in this term (*November* 25th) gave judgment.—The marriage settlement in this case, entered into on the marriage of *William Augustus Skynner*, directed, that after the death of *Lydia Henning Ward*, the estates should go to the use and behoof of such persons as she, whether covert or sole, by her last will and testament in writing, or by any codicil thereto, by her signed, sealed, and published, in the presence of three or more credible witnesses, should appoint. On the 12th *September*, 1789, *Lydia Henning Skynner* made a will. The defendants claim under that will, saying, that it is a good execution of the power. The lessors of the plaintiff say that it was not duly executed so as to be an execution of the power, and therefore claim under the subsequent limitations contained in the marriage settlement. Whether this will was or was not duly executed under the

(*a*) Page 247. (*b*) 4 Maule & Selw. 497.

Doe dem. Spilsbury v. Burdett.

directions of the power reserved to Mrs. *Skynner*, is the point which we have now to consider. At the beginning of the will she declares "this" to be her "last will and testament," and at the end of the instrument she uses the same expression, and then says, "In witness whereof, I have hereunto set my hand and seal, on the day therein mentioned;" and then follow her signature and her seal. On the face of the instrument she is stated to have published the instrument, and at the end of it she declares the instrument to be her last will and testament, and puts her hand and seal to that declaration. On the face of the instrument, therefore, it is a will signed and sealed by herself, and published by her with the attestations affixed. It appears by the depositions of the witnesses, that it was regularly signed, sealed, and published by Mrs. *Skynner* as her will, in the presence of the witnesses. As the power requires that the instrument should be signed, sealed, and published in the presence of and attested by three or more witnesses, it has been contended, that the mere fact of signing, sealing, and publishing, will not support the execution of the power. The lessors of the plaintiff say, that the attestation ought to have expressed that it was executed in the presence of the witnesses; and that, not having done so, it is a void execution of the power. The defendants say, that whatever may be required as to sealing and publishing, that this being a general attestation, it is perfectly sufficient; and as the statement that it was so signed, sealed, and published, is made in the will, it must be taken that all these three things have been regularly done. But to this it is answered, that three ingredients are required to make one complete substantive execution, and that though the statement in the will, and the execution, taken together, might do so, yet that this statement cannot be applied to each part of the required execution, and so the execution must be rejected. As to decided cases on the subject, there are none exactly *ad idem;* but it is said, that the principles laid down in some of them, must be held to apply to the present. The case most relied on is that of *Wright* v. *Wakeford*, in which a power to sell, "testified by writing under their hands and seals, attested by two or more credible witnesses," was held not to be well pursued, when the attestation was only sealed and delivered in the presence of the two witnesses. Lord Chief Justice *Mansfield* thought in that case, "that the attestation must be understood to apply to the signing as well as to the sealing and delivering;" but the other judges of the Court were of opinion that the signing of the parties was not implied in the words used in the attestation. The principle there laid down was afterwards adopted in *Doe* d. *Mansfield* v. *Peach*, and in *Wright* v. *Barlow*. The present case, however, differs from these, for the attestation is in general terms, and so does not fall within the principle of the rule *expressio unius est exclusio alterius*. Before the case of *Wright* v. *Barlow* was decided, an Act (*a*) was passed, which had, it is true, only a retrospective effect; but which, as it seems to me, must be considered as declaratory of the principle which ought to operate. There is another class of cases where the attestation is in general terms like the present. *Moodie* v. *Reid* is a case of this description, in which, under a power similar to the present, the words used in the appointment were "these my last bequeaths, signed by me this 4th *February*, 1812, *S. M.* Witness, *B. H.* and *J. H.*" The power was there held not to be

(*a*) 54 *Geo.* 3, c. 168.

well executed, but, from the language of the Lord Chief Justice, it seems that it was so held, upon the ground that there was no attestation whatever such as the power required; but that, if there had been, it would have been in that general form sufficient. Taking the whole of that case together, it does not lead to any clear conclusion applicable to this case. The next case is that of *Stanhope* v. *Keir*, where the words were " this is my last will and testament," and it was expressed to be signed in the presence of three attesting witnesses. On the argument for the bill, it was insisted that the appointment was not duly made by the will, and *Moodie* v. *Reid* was relied on; but for the plea, it was insisted that the declaration with which the will concluded, was in effect a publication as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts. The Vice-Chancellor, in giving judgment, said, that the argument for the defendants supposed the witnesses to be acquainted with the contents of the will; but that he could not assume more from that attestation than that they saw Mrs. *Keir* sign the instrument. Whether we agree or not with the Vice-Chancellor in his conclusion in that case, we must observe, that there was a statement by the testatrix herself that the will was signed by her. Sir *John Leach*—the same judge—decided a case of *Buller* v. *Burt*, where *Louisa Smith*, a married woman, having a power to dispose of her personal property, executed an instrument in favour of the defendant, and concluded it with the following words: " Signed and sealed at ——, this 13th day of *September*, 1813, by *Louisa Smith*;" then was the place of the seal, and then followed the word " witness" and the names of the witnesses, *John H. Burt* and *Hannah Bowles*. It was said for the other party, that there was no delivery in that case, or if a delivery, that there was not a due execution of the power. The defendant swore that Mrs. *Smith* had delivered it. The question was, whether that was a due execution of the power or not. The Master of the Rolls said, that when the word " witness" without more is used in the attestation, it affirms all that has been done in the presence of the witnesses, which is stated in the body of the instrument; but that there was no statement in the body of the deed that there was a delivery, and that it must therefore be considered as not to have been delivered; and he took up the observation made by the Court in *Moodie* v. *Reid*. In that case, therefore, the general form of the attestation was not sufficient for the execution of the power; but the reason given for its not being so was sufficient to explain the difficulty, and we fully acquiesce in that reason. The last case on this subject is that of *Ward* v. *Smith*, in which the main question seems to have been, whether there was a publication of the will. That case was much relied on for the defendants, but we do not find that it operates further than to show that precise words may be insufficient where the use of more general words would be good. Here such words were used. The will, on the face of it, has all the requisites demanded by the power. We are of opinion, with the Master of the Rolls in *Buller* v. *Burt*, that all the requisites being stated to be complied with in the body of the instrument, the form of the instrument itself shows that there has been a good execution of the power. Besides, the attestation, which is evidence of the signing and of the publication, depositions were taken of the circumstances, but at the trial they were objected to, and were not received. It was afterwards said, that the objection was immaterial, for that the will being afterwards put in,

Doe dem. Spilsbury v. Burdett.

appeared to be above thirty years old, and therefore proved itself. But then, when the will is put in, it must appear to have been well executed according to the power: and as we are of opinion that all the requisites of the power were complied with, we think it sufficiently executed; and the instrument becomes an instrument which proves itself as much as any other instrument of that age would do. Something was said in the argument of the requisites of the Statute of Frauds. There is no doubt that the attestation in the present form would sufficiently satisfy the Statute. All that the Statute requires is, that the testator should sign the will, and that it should be witnessed by a certain number of witnesses. If it is signed and witnessed, the witnessing is an attestation of the signature. But as in this case more is required, we think that more ought to have been done than would be sufficient to satisfy the Statute of Frauds. More has been done, and we think it sufficient. The special case contained other matters, on which we do not think it necessary to give any opinion.

Judgment for the defendants.

The King *v.* Justices of Cambridgeshire.

1. The finding that a way is unnecessary upon the view of the justices, is sufficiently stated in an order made under the 55 *Geo.* 3, c. 68, s. 2, for stopping up the way in these terms: "We, &c., having upon view found, &c."

2. The view must be taken by the justices concurrently at the time of making the order.

3. But it is no objection that at the view no way in fact existed, it having been previously stopped up by the owner of the adjoining land without legal authority.

4. It is sufficient if such an order only contains the words "for the full value thereof" at the end, without having them as well after the direction to sell to the owner of the adjoining land, if he shall be willing to purchase, as in the schedule No. 18, in the 13 *Geo.* 3, c. 78.

5. It is no objection that the order does not contain any certificate of the sale, or direction for the application of the purchase money, that requisition of the 13 *Geo.* 3, being repealed by the 55 *Geo.* 3.

6. It is no objection that, at the time of the order, the owner of the adjoining land, to whom the sale is to be made if he is willing, is himself the surveyor.

7. The justices have jurisdiction to stop up an unnecessary way, if there be a right of way, although there be no actual way.

8. *Quære*, whether, on a motion for a certiorari to bring up an order of Sessions confirming an order of justices for stopping up a way, the Court can entertain objections to the order which are not apparent on the face of it, though the object be to shew a want of jurisdiction.

RULE for a certiorari to remove an order of sessions confirming an order of justices at special sessions, for stopping up a highway. It appeared that *H. J. Adeane*, Esq., a magistrate of *Cambridgeshire*, was possessed of a considerable quantity of land, and that a public way had passed through a part of his estate. In the year 1825 he set out a new way, and after the lapse of six months after the new way was so set out,—the old way not being used by the public,—he stopped it up. An order of justices at special sessions (*a*) was made on 11th *September*, 1834, by three justices, for stopping up the old way, as being useless and unnecessary. On appeal the sessions confirmed the order. Several objections were taken to the order. First, that the terms of the order did not sufficiently express that the order

(*a*) The order was in the following form. —We, &c., assembled at a Special Sessions, *having upon view found* that a certain part of a Common, and ancient King's Highway, called the *Walden-way*, leading from the township of *Fulborn*, in the said county, towards and unto the parish of *Pampersford*, in the said county, situate, lying, and being in the parish of *Babraham*, in the said county, containing, &c., and commencing, &c., and leading through a plantation, in the occupation of *Henry John Adeane*, Esq., until it enters, &c., is useless and unnecessary; do hereby order the same to be stopped up and discontinued, and the land and soil thereof to be sold by the surveyors of the highways of the said parish of *Babraham*, to the said *Henry John Adeane*, whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, *for the full value thereof*. Given under our hands, &c.

was made on a view had at the time by the magistrates making it: secondly, that the direction to sell it for full value, did not clearly point out Mr. *Adeane* as a person, who, if he became the purchaser, must give full value for it; but only applied to the sale to other persons, in case he was not willing to become a purchaser: thirdly, that there was no certificate of the sale of the old highway, and of the application of the money arising from such sale: fourthly, that it was shown upon affidavit, that the magistrates, not being justices of the county, had no jurisdiction to make the order: fifthly, that it was also shown that Mr. *Adeane*, who was the purchaser of the old road, was himself the surveyor at the time. It was also objected that the order was in fact for a diversion, though it purported to be for stopping up a way as unnecessary; and that as the way had at the time no existence in fact, it could not be stopped up.

Sir *W. Follett* and *Byles* showed cause on the part of the justices.—The Court will not remove an order of this sort, unless there is some error apparent on the face of it; there is no such error here. The order is a good order, it is framed according to the directions in the *55 Geo. 3*, c. 68, s. 2. By that statute it is provided, "that when it shall appear upon the view of any two or more of the said justices of the peace, that any public highway, &c., is unnecessary, it shall and may be lawful by the order of such justices, or any two of them, to stop up, and to sell and dispose of such unnecessary highway, &c. by such means, and subject to such exceptions and conditions, in all respects, as in the said recited act, (namely, the *13 Geo. 3*, c. 78,) is mentioned in regard to highways to be widened and diverted." By the Statute thus referred to, it is provided (s. 19,) that a party aggrieved by such order for stopping up an old road, may appeal to the Sessions, "which Court of Quarter Sessions are thereby respectively authorized and empowered to hear and finally determine such appeal, and if no such appeal be made, or, being made, such order and proceedings shall be confirmed by the said Court, the proceedings thereupon shall be binding and conclusive on all persons whomsoever." The 17th section providing for the sale of the soil of the old highway, directs "that the land and soil thereof shall be sold by the said surveyors, with the approbation of the said justices, to some person or persons whose lands adjoin thereto, if he, she, or they shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof." The order made in this case has fulfilled the requisites stated in these Acts. The *55 Geo. 3* is the Act on which this order to stop up is made. The forms of proceeding by this latter Statute must be framed according to those in the *13 Geo. 3*. It therefore becomes necessary to look to the construction put by the Court upon the provisions of that Act, with reference to the Act for diverting and widening. In *Rex* v. *The Justices of Worcestershire* (*a*), it was held that an order declaring that the "justices having upon view found, or it having appeared to them," was bad for uncertainty. That objection cannot be made here; the order distinctly states, in the very words of the Act, that it was made upon view. [Lord *Denman*, C. J.—We have no difficulty upon that point.] With respect then to the other objection, namely, that the words "full value" only apply to the latter part of the sentence.

(*a*) 8 Barn. & Cress. 254.

King's Bench.

The KING v. The Justices of CAMBRIDGESHIRE.

The words of the order are in this respect an exact copy of the words of the 13 *Geo.* 3; but the words in the order are not repeated twice on the same subject, as in the Schedule to that Act. The meaning, however, is obvious—the owner of the adjoining land, if he becomes a purchaser, must, like any other person, pay the full value for the land. There are other objections upon the affidavits, but they merely relate to the conduct of the parties, all which was fully considered at the sessions; these objections cannot now be discussed.

B. Andrews for Mr. *Adeane*, was heard on these latter objections alone.

Sir *F. Pollock*, *Kelly*, and *Starkie*, *contrà*.—The language used in the order, "having upon view found," is quite consistent with the fact of the justices having viewed the road separately, or at a former period of time. The Act requires that the view should be taken by the justices jointly, and at the time when the order is made. The language of the Statute ought to have been precisely followed. The omission of the words "for the full value thereof," after the direction to sell to Mr. *Adeane*, is material. Those words are in the Schedule of the Statute; and by the terms of the Act, the form in the Schedule is to be adopted. *Davison* v. *Gill* (*a*) is in point. The certificate of sale, and application of the purchase money, is expressly referred to by No. 19 of the Schedule of the 13 *Geo.* 3. There can be no objection to its being shown on affidavit, that the magistrates had no jurisdiction to make the order, and therefore that the order is void. In *Rex* v. *Standard Hill* (*b*), it was held on an appointment of two justices, of overseers of the poor, that the Court would go into the question on affidavit, whether the place for which the appointment was made was a township or vill. So in *Rex* v. *Great Marlow* (*c*), it was determined, that affidavits may be read in support of objections, of the want of jurisdiction, against the appointments of magistrates, which upon the face of them appear to be good. If these objections are gone into, then it is shown that the justices were not magistrates of the county, and therefore had no jurisdiction to make the order. It also thence appears, that Mr. *Adeane* was himself the surveyor at the time the sale to him took place. The principle adopted in equity, that a trustee cannot sell to himself, applies here. The other objections are also fatal to this order.

Lord DENMAN, C. J.—This is an application for a certiorari to remove an order of Sessions, by which an order of justices at Special Sessions, for stopping up a highway, was confirmed. Several objections are made to the form of the order; and it is said also that it is void, because the justices had not full jurisdiction. The first objection is, that the order does not state, upon whose view the way was found to be unnecessary; as the expression "having upon view found," does not necessarily imply that it was upon the magistrates own view; nor does it show that the view was taken by the magistrates concurrently. I should think, in point of law, that the latter objection is well founded, if the construction contended for is the proper one to be put upon the order. No view is sufficient to give jurisdiction to

(*a*) 1 East, 64. (*b*) 4 Maule & Selw. 378. (*c*) 2 East, 244.

the justices, unless it be a joint view; and the finding must be the result of that joint act on the part of the justices. It must, however, be presumed, that in making this order the justices acted in concert together. As to the matter to be found: although the jurisdiction is given by the *55 Geo. 3*, c. 68,—which is applicable to the stopping up of ways as useless—yet the form which has been followed, is precisely that which is given in the *13 Geo. 3*, c. 78; the language used, "having upon view found," being that used in the Schedule to the latter Act. The legislature has therefore authorised that form of expression; and we must hold it to be sufficient. The second objection is, that the words, "for the full value thereof," are not twice inserted; as well in that part of the order, which requires the land to be sold to the owner of the adjoining land, as at the conclusion of the order. The enacting part, s. 17, of the *13 Geo. 3*, c. 78, which requires the land to be sold by the surveyor, requires merely that it shall be sold to "some person or persons whose lands adjoin thereto, if he, she, or they shall be willing to purchase the same; if not, to some other person or persons, for the full value thereof." The form in the Schedule, No. 18, certainly has the words "for the full value thereof" twice. The language is "the land and soil thereof, to be sold by the said surveyor to ———, whose land adjoins thereto, if he shall be willing to purchase the same, for the full value thereof, if not, to some other person or persons, for the full value thereof." I must own, however, that the objection is not entitled to any weight; because I think the words used in the Schedule cannot be understood in any other way than as fixed by the enacting part of the Statute. Then follows the objection, that there is no certificate of the approbation of the sale by the justices. Upon looking at the *55 Geo. 3*, c. 68, s. 2, it appears that such part of the *13 Geo. 3*, c. 78, s. 17, as requires the certificate, is repealed: for the money is to be paid to the surveyor, to be applied to the general purpose of repairing the highways. On the face of the order there is therefore no good objection. It is however contended, that the party is at liberty to show, upon affidavit, facts which tend to prove that the magistrates had no jurisdiction, by showing, that at the time of the alleged view, circumstances existed which totally prevented the exercise of any judgment. It is said, that as the way was then already in fact stopped up, the justices could not come to a conclusion that it was unnecessary. I do not, however, think that there is any thing in that argument; a mere right to the use of a passage will give jurisdiction to the justices, as well as an existing way. The way in which the road became useless cannot be material. There is nothing therefore in this objection; nor do I see any thing in the objection, that Mr. *Adeane* was himself the surveyor at the time the order was made. If there had been any suggestion of fraud, it might have been otherwise. I therefore think that the order is good, both upon the face of it, and upon the facts which have been disclosed by the affidavits.

PATTESON, J.—I entirely concur. The order appears to have been drawn up from the two forms in the Schedule to *13 Geo. 3*, c. 68, Nos. 16 and 18. In No. 16, the form is "having upon view found." It is objected, that the order does not show that the road was found to be unnecessary upon a view had by the justices concurrently, or upon a view had by themselves at all. No doubt the Statute requires a personal view of two or more justices

King's Bench.

The KING v. The Justices of CAMBRIDGESHIRE.

viewing it together; and the legislature says, the form in which such view shall be stated in the order shall be "having upon view found;" this we are bound to believe means "having upon our own joint view found" according to the directions of the section. Then it is objected that the words "for the full value thereof" should have been inserted after the direction to sell to Mr. *Adeane*, if he was willing. In the clause of the Act the words occur only at the end, as in the order, and manifestly apply to the whole of that which precedes. But in the Schedule the words occur twice, and it is argued that the form in the Schedule should be closely pursued. This, however, is clear, that the words in the clause and the Schedule are intended to be *ad idem*. It is true that by the 69th section it is enacted, that the forms given in the Schedule shall be used, but the same section provides that no advantage shall be taken of a defect of form. Then, objections arising out of the facts in the affidavits are stated. I protest against its being understood *as laid down*, that we can on any occasion look into extrinsic matter upon affidavit upon a rule for a certiorari to remove an order of Sessions into this Court. I give no opinion upon the point. The general rule certainly is, that where any thing is brought up by certiorari, no objection can be taken which does not arise upon the face of it. Here, the objections which have been taken, might have been brought before the Quarter Sessions. However, supposing there were not such a rule, and that we could look into the affidavits as it has been contended, I can see no valid objections to this order. The road had been in fact stopped up for several years. I dare say, that when the magistrates went to view, they could not see the actual road in length and breadth, but they may, at all events, have seen the line and direction. The magistrates saying that they had viewed, is sufficient. If the road existed in point of law, that is enough. As to the fact that Mr. *Adeane* was the surveyor at the time, that appears to me to afford no ground of objection, in the total absence of fraud. Even if fraud did exist, I think it would be matter for the Sessions, and not for the consideration of this Court. It was also objected, that nothing is said in the order as to the application of the money to be paid for the soil of the highway. In the Forms Nos. 16 and 18, nothing is said about the application of the money, but a form of a certificate to be written underneath the order is given. The certificate is done away with by that part of the *55 Geo.* 3, c. 68, s. 2, which directs that the money to be paid for the soil of the unnecessary road, shall be applied to the general fund for the repairs of the highways in the parish.

WILLIAMS, J.—The most important question is, as to how far we can on affidavits go into the question, whether there was a total absence of jurisdiction. On this point, however, I give no opinion. Here, it is not made out that the magistrates were wholly without jurisdiction. The road may, at the time of the view, have been converted into arable land, but still it remained sufficiently a road to found a jurisdiction in the magistrates to stop it up. The case of *Welch* v. *Nash* (*a*) unquestionably leaves it open to parties to question the jurisdiction in an action, but it goes no further. Objections are made to this order as arising upon the face of it, and the first objection is, as to the words "having upon view found." We must read these expressions in the ordinary way. We must not make a violent construction in favour of the order, nor must we force it into nonsense. It must be taken to mean,

(*a*) 8 East, 394.

that the finding was upon the joint view of the justices who make the order. Another objection is, that the words "for the full value thereof" are not repeated. Upon this I agree with the rest of the Court.

COLERIDGE, J.—I am of the same opinion. It is most important that this Court, which is to restrain inferior Courts in their proceedings, should be most cautious in exercising its powers, except in cases where it sees that those proceedings are contrary to law and justice, and except where the law has clearly defined that an appeal to this Court should lie. It is right too, that inferior Courts should know, that when their decision upon the subject-matter before them is to be final and conclusive, this Court will not interfere without some good ground being clearly made out. The order in this case may be considered as subject to three objections: first, that there was a deficiency in the evidence on which it was founded; secondly, that it tended to inconvenience and injustice; and, thirdly, that it was made without jurisdiction in the justices. If the order was likely to produce inconvenience and injustice, the legislature has provided a remedy for that evil, in an appeal to the Quarter Sessions, and the decision of that Court is final. If the order has been made without jurisdiction in the magistrates making it, it is unnecessary for this Court to interfere to quash it, for he who asks that it may be quashed, may contest its validity in an action of trespass; and if his objection be well founded, the order will go for nothing, and nobody's interests will be affected by it. That is a point of law about which there can be no doubt. So that without laying down any broad rule upon orders which have been made by magistrates under highway acts, it is sufficient to say, that from any such order there may always be an appeal; and then, though such order may be confirmed, it will be good for nothing if it is made without jurisdiction in those who make it. This Court is then relieved from the necessity of looking at the objections of inconvenience that may be supposed to arise under such an order. I say nothing of the weight of these objections in the present case. I must observe this, that the more strong are the objections on the ground of inconvenience, the more strong must be the reason that those objections should be examined into at the Court of Quarter Sessions. That Court, we must presume, will act justly, and not allow the magistrates to exceed their jurisdiction; for if they do, the order made by them will be but a nullity. This brings me to the other class of these objections. The first is, that the order purports to be made on view without more; and the other is the omission of the words "full value" in the contingent directions as to the sale of the soil of the highway to the owner of the adjoining land. The words are "we having upon view found." What do they mean? Does not the expression imply knowledge? There is a distinction between what is done upon view, and what is done upon evidence. The Statute, in requiring the magistrates to make their order upon view, means, that they are to proceed upon their own view taken at the time; and we cannot, in my opinion, give any other meaning to these words, than that the magistrates here, have upon their own view, found certain facts to be as stated by them in the recital of the order. I come then to the observations made with respect to the words "full value." The objection founded upon the use of those words has been put in more than one way. The legislature, in the very section giving the power of sale, has used those words only once. Can

King's Bench.

The KING v. The Justices of CAMBRIDGESHIRE.

we then say that the omission of them in one part of the sentence is material; and that, placed as they are at the end of that sentence, they do not override the whole sentence? They must do so in order to effect the object of the section into which they are introduced. It would be productive of the most inconvenient consequences to adopt any other construction of the sentence; and, it seems to me, that no other can fairly be given to it. There are one or two other objections less important in their nature. The first is, that there is no date given as to the time of payment. That was not a necessary part of the order, for the money was to go, under the former statute, to the owner of the land; but, under the *55 Geo. 3*, it is to go into the hands of the person who is to make the sale,—namely, the surveyor; part of whose duty it is to obtain payment; and the direction to obtain payment was therefore in such a case quite unnecessary. With regard to there being no certificate of sale, the thing speaks for itself. There could be no certificate. The sale must follow the order—they could not be concurrent acts: and if you bring the order here, and thus prevent the sale, how is it possible that there should be any certificate of sale? I am therefore of opinion, that the objections made to this order have not been supported, and that the rule for the certiorari must be discharged.

Rule discharged with costs.

HOLMES *v.* MENTZE.

1. The sheriff cannot support an interpleader rule on a claim made on goods seized under a *fi. fa.*, in respect of an interest as a partner, even though the claimant states that on the balance of accounts the partnership is indebted to him, and that, therefore, he alone is beneficially interested.

2. Where, in such a case, the execution creditor refused either to admit or deny the partnership, the Court enlarged the time for returning the writ until the sheriff was indemnified.

THIS was a rule obtained by the Sheriff under the Interpleader Act. The plaintiff obtained a judgment against the defendant, who was a wine-merchant carrying on business under the firm of *L. Mentze* & Co. On 17th *February*, 1835, the plaintiff issued a *fi. fa.* on the judgment, and the Sheriff took the stock in trade of the defendant. On 18th *February*, 1835, a person named *John Heap* came in and claimed the goods, and served the following notice on the plaintiff, and on the sheriff:—"I hereby give you notice, that all the goods, chattels, and effects in, &c., seized by you, or some or one of you, by virtue of or under colour of a writ of execution, issued against the goods and chattels of *L. Mentze*, of *Manchester*, wine and spirit merchant, are the property of the partnership concern subsisting between me and *L. Mentze*, and carried on under the firm of *L. Mentze* & Co.: and that *L. Mentze* hath not any property, part, or share in the said goods, chattels, and effects, but is, on the contrary, considerably indebted to me on the balance of accounts of the copartnership, and I am alone beneficially entitled to and interested in all the goods, chattels, property, and effects of the said partnership: and I therefore require you and every of you forthwith to withdraw from and quit the possession of the premises, and to deliver up to me the quiet possession thereof, without any injury or damage to the same: and, in default of your so doing, I shall commence against you respectively such actions, suits, and other proceedings as I may be advised. Dated, &c." It appeared on the affidavits, that *Heap* had become a dormant partner with the defendant in *April*, 1831, and that on the annual accounts,—balanced on the 30th *June*, 1834,—the defendant was indebted to the partnership in *2557l.*, and that the debt had been subsequently increased. *Knowles*, in *Easter* term, obtained the rule *nisi* on behalf of the Sheriff, and now

The *Attorney-General* and *Montagu Chambers* showed cause on the part of the plaintiff.—It is clear that this case is not within the Interpleader Act. Where there is merely an equitable claim, the Court will not interfere under that Act; *Sturges* v. *Claude* (*a*). The Sheriff has a right to take the goods, and to sell the interest of the defendant; and the purchaser must be at the peril of the purchase, and must settle the account with *Heap*, the solvent partner; *Parker* v. *Pistor* (*b*), *Chapman* v. *Koops* (*c*). There is no issue which the Court could direct in this case which could affect the Sheriff. He is not in peril, and has only to put up the goods to sale, and let any person purchase them at his peril. The duty of the Sheriff is clearly pointed out in the 1 & 2 *Wm.* 4, c. 58, s. 6; and he will not expose himself to any action in pursuing it. There is, therefore, no pretence for this rule.

Sir *F. Pollock* and *Tomlinson* appeared for *Heap*, to prevent his being barred under this rule, and relied on *Harvey* v. *Crickett* (*d*).

Sir *W. Follett* and *Knowles* in support of the rule.—The right of the Sheriff to seize the goods is not denied, but he is not compelled, under circumstances like the present, to sell them. He does not know whether to sell the goods as the property of the partnership, or of the defendant. This case is precisely the same as that of a case of lien upon goods, in which case the Court will interfere; *Cotter* v. *Bank of England* (*e*). [*Coleridge*, J.—Does your affidavit show that after you received the notice you had any communication with the plaintiff?] The affidavit is in the form required by the Statute. [*Coleridge*, J.—Should you not show what is the nature of the danger which the Sheriff is in?] It is sufficient to show that there are opposing claims to the property. *Heap* claims the whole of the goods, and appears here to-day to support his claim. [*Patteson*, J.—What is the danger which the Sheriff incurs? He may give notice of the claim of partnership, and there may not be any purchaser.] That very circumstance justifies this application to the Court. If there was no dispute as to the property, the Sheriff might sell, but there is a *bonâ fide* dispute, and the Sheriff ought not to be called on to decide between the parties. After receiving notice, the Sheriff is clearly bound to act upon the knowledge which that notice gives him, of the existence of a claim to the goods on the part of a third person. That brings the case clearly within the Interpleader Act. The Sheriff cannot possibly sell a partnership interest; he cannot make himself a tenant in common with the other partner; *Burton* v. *Green* (*f*). If the execution creditor requires the Sheriff to sell the goods at all events, he should give an indemnity.

Lord DENMAN, C. J.—This is a case in which the Sheriff is called on by the execution creditor to sell goods which a person, who says that he is a partner with the defendant, claims as belonging to the partnership. He requires the Sheriff not to sell the goods, as well on that ground, as because the defendant is indebted to him, the partner, in a greater amount than the

(*a*) 1 Dowl. P. C. 505.
(*b*) 3 Bos. & Pull. 288.
(*c*) 3 Bos. & Pull. 289.
(*d*) 5 Maule & Selw. 336.
(*e*) 3 Moore & Scott, 180; S. C. 2 Dowl. P. C. 728.
(*f*) 3 Car. & Payne, 306.

value of the goods. That circumstance does not change the duty of the Sheriff. He is bound to sell such interest as the defendant, the debtor, has. Under the old law, the Sheriff must seize the goods, and would become a tenant in common with the partner. If he seizes the goods, and offers to sell them, suggesting, at the same time, that another person has an interest in them as a partner, and any one should offer to purchase them, he must do his best to ascertain what is the real interest of the debtor in them. There is not any one here who can be called an adverse claimant. My brother *Coleridge* says, that the course in the Court of Common Pleas is, to require the Sheriff to show that there are adverse claims, and that some communication has been made with the adverse creditor, respecting the nature of his claim. Then it is suggested, that as the execution creditor has required the Sheriff, since this claim was made, to sell the goods, he should indemnify the Sheriff; and we think that, supposing that he does insist on the Sheriff selling these goods as the goods of the defendant, and denies that they are partnership property, he should indemnify the Sheriff against the claim of *Heap*.

PATTESON, J.—There is no difficulty in the case. If it is conceded that these are partnership goods, then the old law applies; but if it is not so conceded, then the Sheriff is between two fires. If he treats them as the individual property of the debtor, he is liable for selling the goods of the partner: and if he does not sell, the execution creditor may come upon him for a false return; so that he ought to have time to return the writ, unless one of the parties claiming will indemnify him. But this rule itself must be discharged. The affidavits should however be filed.

Rule discharged.

Knowles, on a subsequent day (*November* 16th), referring to the former application in this case, obtained a rule nisi on behalf of the Sheriff for a rule to enlarge the time for making the return to the writ. The affidavits showed that the plaintiff had ruled the Sheriff to return the writ, and on an application by the Sheriff to know whether he meant to admit that *Heap* was a partner or not, he refused to give any answer.

The *Attorney-General* and *Montagu Chambers* showed cause.—In *Parker* v. *Pistor* (*a*), the Court of Common Pleas refused an application like the present; and in *Chapman* v. *Koops* (*b*), the Court refused to allow it to be referred to the Master to inquire what was the defendant's interest in the effects seized, observing, that "the Court had no right to restrain the plaintiff from taking advantage of the execution which he had issued."

PATTESON, J. (*c*).—We have not the least difficulty about this case. It is said that the Court will not interfere in this summary manner, unless there is misconduct on the part of the execution creditor. Here, we think that there has been misconduct on his part: he has misconducted himself with respect to this Court, for when on a former occasion there was an application made

(*a*) 3 Bos. & Pul. 288.
(*b*) Id. 289.
(*c*) Lord *Denman*, C. J. was absent.

under the Interpleader Act, the execution creditor said, that he did not dispute the partnership, and on that ground we discharged the rule. Now he comes to demand that the Sheriff shall sell the goods as the individual property of this person; he does not ask that the Sheriff may sell the debtor's share of the goods, but that he may sell the goods without reference to the question of partnership. The execution creditor has therefore been guilty of great misconduct towards the Court, and upon that ground the Court will interfere. If the question was, whether these were partnership goods or not, the Court would grant an issue; but as the execution creditor has here disclaimed disputing the partnership, we think that he is bound by that disclaimer, and we will interfere for the protection of the parties.

Per Curiam. Rule absolute.

BAYLIS *v.* HAYWARD.

SCIRE FACIAS on a judgment in assumpsit, recovered by the plaintiff against the defendant, for the sum of 56*l.* 10*s.* The declaration stated a *sci. fa.*, tested on the 3d *November*, 1834, returnable on the 12th *November*, with a return of *nihil* and *non est inventus*, and then an *alias sci. fa.*, returnable on the 20th *November*. *Pleas:* First, *nul. tiel. record*;—secondly, that the plaintiff, before and on the 20th *December*, 1831, and from thence continually until the issuing of the commission thereinafter mentioned, was a printer, &c., that he became and was a bankrupt, and that thereupon afterwards, to wit, on the 3d *January*, 1832, a commission of bankruptcy was duly awarded, &c., and issued against the plaintiff, and he was duly declared a bankrupt. *Averment:* that afterwards, and after the commencement of the 1 & 2 *Wm.* 4, and before the issuing of the writ of *sci. fa.*, and before the commencement of the proceedings in the *sci. fa.*, to wit, on the 16th *January*, 1832, certain persons, named *Charles Martyr*, *Christopher Magnay*, and *Peter Harris Abbott*, were duly chosen and appointed assigness of the estate, &c. of the plaintiff; and thereby all the estate, &c. of the plaintiff became vested, and are now vested in the assignees, &c.

Replication to the first plea, alleging a record.

Special demurrer to the said last plea: for that it is not in or by the said plea stated with sufficient certainty, what was the nature of the causes of action, for and in respect of which the said judgment was so recovered as aforesaid; whether they were for a debt, or for liquidated or unliquidated damages, or what else in particular; and also for that it is not stated with sufficient certainty whether the said judgment, so recovered as aforesaid, was before or after the plaintiff so became bankrupt as aforesaid. That it must be presumed and taken as the fact, that the said causes of action were not for debt, or for liquidated damages, but were for unliquidated damages; and also that the plaintiff became a bankrupt, as aforesaid, after the said judgment was so recovered as aforesaid; and that being so, and the plea not stating that the plaintiff's aforesaid assignees interposed, or claimed the benefit to be derived from the said causes of action, or the said damages so recovered as aforesaid, or any part thereof, such plea is insufficient; and also for that the said plea does not state or show that the

1. In a proceeding by *scire facias* on a judgment, a plea of bankruptcy of the plaintiff must show distinctly that the bankruptcy happened at such a time that the defendant had no opportunity of pleading the fact to the original action.

2. A plea which left it uncertain whether the bankruptcy happened subsequently to the judgment, was held bad on special demurrer.

3. Nothing can be pleaded to a *scire facias* on a judgment, which might have been pleaded to the original action.

said assignees have made any claim whatsoever to the said damages so recovered as aforesaid; and also for that it is a maxim in law, that no defence can be pleaded which existed anterior to the recovery of the judgment. Nevertheless the said plea sets up such a defence, the said *Charles Martyr*, *Christopher Magnay*, and *Peter Harris Abbott*, having, as will appear from the said plea, become such assignees as aforesaid long before the recovery of the said judgment, and before the verdict was given and obtained in the said action; and also for that the said plea sets up matter *in pais* against the said record, and is in other respects insufficient, &c. *Joinder in demurrer.*

Alexander, in support of the demurrer.—The question in substance is, whether a cause of action, accruing within three days of the bankruptcy, can be taken advantage of by the assignees. That which could be pleaded in bar of the action, cannot be pleaded in bar of the *scire facias* on the judgment; *Cooke* v. *Jones* (*a*). The bankruptcy of the plaintiff should have been pleaded *puis darrein continuance*. If that had been done, it might have been in bar of the action, but not having been so pleaded, it cannot be pleaded now. It is not shown whether the demand was for debt, or liquidated or unliquidated damages; it must therefore be presumed to have been for unliquidated damages. The intendment with respect to a plea is most strong against the pleader, who is bound to exclude from his pleadings any reasonable doubt; *Com. Dig.* (*b*). If therefore the nature of the action is not shown with sufficient certainty on the face of the pleading, it is bad. The action here might have been for the recovery of unliquidated damages in contract, which would pass to the assignees; *Wright* v. *Fairfield* (*c*); or for unliquidated damages for a personal tort, the right to sue for which could not have passed to the assignees;—the nature of the claim ought to have been shown with certainty. Again, it is not stated with sufficient certainty whether the damages were recovered before or after the bankruptcy. If not recovered till after the bankruptcy, the answer to this *scire facias* must be founded on an interference by the assignees. That interference ought to have been distinctly shown; *Drayton* v. *Dale* (*d*).

Mansel, contrà.—If the cause of action is complete at the time of the bankruptcy, it must go to the assignees. It was so here. The Court gave judgment for the plaintiff in the original action. The damages were something additional, which he obtained by that judgment, and they could not be made the subject of a plea in bar to the original action. The damages clearly pass to the assignees; yet here the plaintiff claims them as his own. The judgment here was after the bankruptcy. [*Coleridge*, J.—But it is not so stated in your plea.] No, but it clearly was so. In *Kinnear* v. *Tarrant* (*e*), it is said by Lord *Ellenborough*, that the plea of bankruptcy is a legal bar which the Court cannot set aside; and the opinion of Lord *Mansfield*, in a case there stated, is cited to the same effect. It is clear that the proceeding by *sci. fa.* is an action. The defendant may plead to it, as to any other action, payment or any other answer. Here the plea is, that the right of

(*a*) Per Lord *Mansfield*, Cowp. 728; 2 Wms. Saund. 72, t.
(*b*) Pleader, (E 6.)
(*c*) 2 Barn. & Adol. 727.
(*d*) 2 Barn. & Cress. 293.
(*e*) 15 East, 631.

action claimed by the plaintiff, was legally vested in other persons, and that it became so vested by the plaintiff's bankruptcy. While the bankruptcy continues, the plaintiff cannot claim any beneficial interest arising from that right. The right to recover at law has passed to the assignees, and therefore the plaintiff is not entitled now to have the *sci. fa.* The damages in the original action were a part of his personal estate, and as such vested in his assignees.

Alexander, in reply.—The case of *Kinnear* v. *Tarrant* is not in point;—that was a *sci. fa.* on a recognizance of bail, where there having been a *sci. fa.* and an *alias sci. fa.*, a bankruptcy had occurred between the two: and the question there was, whether the bankruptcy might then be pleaded. The circumstances there were not at all like the present.

PATTESON, J. (*a*)—This is a proceeding upon a *scire facias*, brought by a person who has recovered a judgment in an action of assumpsit. The defendant has pleaded in substance, that the plaintiff became bankrupt, but he does not state when. The plea begins by saying, that on a certain day, to wit, on &c.,—the day is immaterial, of course,—he became and was a bankrupt; but it is not averred whether this was before or after the particular time of the judgment. It is alleged, that from the 20th *December*, 1831, to the time of the commission issuing, the plaintiff was a trader, but in the latter part of the plea it is said, that "afterwards and before the issuing of the writ of *sci. fa.*, and the commencement of the proceedings in *sci. fa.*, to wit, on the 16th *January*, 1832, the plaintiff then and there continuing a bankrupt, the commission being in full force and effect;"—assignees were appointed, and that all the estate and effects of the plaintiff, and all the causes of action, arising before the bankruptcy, vested in the persons so appointed. But still it does not appear but that this bankruptcy was before action brought, and still more, it does not appear but that it was before judgment given, so that the defendant might before have had the opportunity of pleading this very bankruptcy to the original action. Now there is no rule clearer, than that you cannot plead to a *sci. fa.* on a judgment, that which might have been pleaded in defence of the original action. I have looked into the authorities to see how this point has been raised;—as far as those stated in the note to *Williams's Saunders* (*b*) go, it appears in every one of them affirmatively, that the defendant could have pleaded the matter before. In this case it does not appear to be so; but as the defendant has not pleaded that plea, unless the fact be that he had not an opportunity before of pleading it, it is incumbent on him to state the time when the judgment was obtained, that we might see whether he had or not. If he had stated, that after the judgment the plaintiff had become bankrupt, we should have seen that he could not have had an opportunity of making that defence at an earlier period. It seems to me that the cause of demurrer, which is here specially stated, that it is not averred with sufficient certainty when the judgment was recovered, is a good cause of demurrer. I do not know whether it would or not be a good cause of general demurrer, but it is certainly good upon special demurrer.

(*a*) Lord *Denman*, C. J. was absent. (*b*) 1 Wms. Saund. 72, t.

King's Bench.

BAYLIS v. HAYWARD.

WILLIAMS, J.—I am of the same opinion. If the bankruptcy did occur before the judgment, there was an opportunity of pleading it in defence, and it should have been pleaded;—the cases are numerous to that effect. Here the matter is left in uncertainty.

COLERIDGE, J.—I concur with the rest of the Court, on this short ground,—the plaintiff has sued upon a cause of action, has got a judgment, and must *primâ facie* be presumed entitled to the fruits of that judgment; yet he is now sought to be deprived of that which clearly appears to be his right, by the defendant's plea, that the plaintiff has become a bankrupt, and that all his rights have become vested in his assignees. That may or may not be a defence, according to the time when the bankruptcy happened. That time should have been distinctly shown. He who alleges a state of things to take away a right from another party, is bound to make the case perfectly clear, and is not at liberty to state things which may be consistent with one issue or another, but must state distinctly what is his right.

PATTESON, J.—In the case in 15 *East*, it appears negatively that the party could not have pleaded before, for it is a *sci. fa.* on a recognizance of bail.

Judgment for plaintiff.

BIDDLECOMBE *v.* BOND.

A warrant of attorney was given, subject to an agreement that judgment was not to be entered up and execution issued until a certain time, unless in the meantime the defendant became bankrupt or insolvent:—*Held*, that the word "insolvent" could not be restrained to taking the benefit of the Insolvent Debtors' Act, but that the plaintiff might proceed on the warrant of attorney, on the defendant being in such a situation as to owe more than he had assets to pay with.

THE defendant, on 6th *December*, 1834, gave a warrant of attorney to the plaintiff to secure the sum of 170*l.* By the defeasance, it was agreed between the plaintiff and the defendant, that no judgment should be entered up, or execution issue, unless, or until default should be made in payment of the said sum of 170*l.* by three several instalments of 56*l.* 13*s.* 4*d.* each, payable respectively on three several days agreed upon. On 30th *March*, 1835, a short time before the first instalment became due, an agreement was entered into, by which an extension of time was given. The agreement was to the following effect:—

"Memorandum of agreement entered into the thirtieth day of *March*, one thousand eight hundred and thirty-five, between *William Biddlecombe*, of *Southampton*, draper, of the one part, and *Thomas Bond*, of *Southampton*, hatter, of the other part. Whereas *Thomas Bond* has by his warrant of attorney secured unto *William Biddlecombe* the sum of one hundred and seventy pounds, payable by three equal instalments, the first whereof becomes payable on the sixth day of *April* next. It is hereby agreed between the said parties, that, in consideration of thirty pounds, to be paid by the said *Thomas Bond*, in pursuance of his acceptance for that amount, at three months' date from this day, and of his hereby agreeing to pay the further sum of twenty-six pounds on or before the twenty-ninth day of *September* next, and the remainder of the debt by instalments of various small sums, according to his ability, so that the whole shall be discharged with interest on or before the first day of *April*, one thousand eight hundred and thirty-six: then, unless the said *Thomas Bond* shall in the meantime

have disposed of his business, or unless he shall have become bankrupt or insolvent, the said *William Biddlecombe* shall not enter up judgment on his warrant of attorney, but otherwise it shall remain in full force. Witness the hands of the parties. *W. Biddlecombe,*
Thomas Bond."

On the 8th *July*, 1835, the stock in trade and effects of the defendant were taken in execution under a *fi. fa.* issued at the suit of the plaintiff on a judgment entered upon the warrant of attorney. On the 14th *July* an order was made by *Williams*, J. for setting aside the judgment and execution, on the ground, that although the defendant was not in solvent circumstances, he had never disposed of his business, become bankrupt, or taken the benefit of the Insolvent Debtors' Act, or made any declaration of insolvency. A rule was obtained to show cause why the order of *Williams*, J. should not be set aside, upon affidavits which showed that in several conversations the defendant had admitted that he could not pay twenty shillings in the pound, if he were called upon to make immediate payments to all his creditors, and that his circumstances were generally embarrassed.

Hodges showed cause.—As it is admitted that the defendant had not either disposed of his business or become bankrupt, the question is, whether he can be said to have become insolvent within the only other alternative of the agreement, so as to authorize the plaintiff in signing judgment, and issuing execution. It may be true, that as a general proposition, insolvency, as respects a trader, means that he is not in a situation to make his payments as usual; *Bayley* v. *Schofield* (*a*), *Cutler* v. *Sanger* (*b*). The question here, however, is, what is the meaning to be attached to the word "insolvent" in this agreement, standing as it does in close connection with bankruptcy; it can only mean having taken the benefit of the Act for the Relief of Insolvent Debtors. In *re Birmingham Benefit Society* (*c*) a similar construction was put on the word when used in a statute. The 33 *Geo.* 3, c. 54, s. 10, enacted, that if any person holding office should become bankrupt or insolvent, his assignees should pay all sums due, &c. The Vice-Chancellor considered, that in the statute the legislature could only mean, by the expression "insolvent," a person who had availed himself of the Act, and accordingly dismissed the petition with costs. The same interpretation must be put upon the agreement in the present case; and if so, the state of things which authorized the signing of the judgment and issuing of the execution never occurred. The order for setting them aside must therefore stand.

Erle, in support of the rule, relied upon *Parker* v. *Gossage* (*d*).

Lord DENMAN, C. J.—I think we should not be justified in restraining the meaning of the word "insolvent" in the agreement to so narrow a compass as the actual taking the benefit of the Insolvent Act. The expression must have a wider interpretation; and I am therefore of opinion,

(*a*) 1 Maule & Selw. 354.
(*b*) 2 Glyn & J. 469.
(*c*) 3 Sim. 421.
(*d*) 1 Gale, 288.

King's Bench.

BIDDLECOMBE. v. BOND.

that the plaintiff has not violated the stipulation contained in the agreement. The rule must accordingly be absolute for setting aside the order of the learned judge.

PATTESON, J. and COLERIDGE, J. concurred.

Rule absolute.

MEE and an^r. v. TOMLINSON.

1. Indebitatus assumpsit for work and labour, money paid, and on an account stated. Plea, as to 20*l.*, parcel of the monies in the first two counts mentioned, and as to 20*l.*, parcel of the money in the last count mentioned, that the said two sums were the same debt, and then payment in satisfaction of the 20*l.* :—*Held*, on special demurrer, that this plea was bad for not stating how much of the 20*l.* due on the account stated was applicable to the count for work and labour, and how much to the count for money paid :—*Held*, also, that it was unobjectionable on account of the averment of identity, as that averment merely amounted to an allegation that the sum due on the account stated was due on the same cause of action as the sums mentioned in the first two counts, which is allowable by the new rules

2. A plea of set-off of a smaller sum than that to which the plea is applied, is bad.

INDEBITATUS ASSUMPSIT for work and labour as attornies, money paid, and on an account stated. Each count laid the sum at 200*l.* Fifth plea, as to the sum of 20*l.*, parcel of the said sum of 56*l.* 11*s.* 8*d.*, parcel of the monies in the first two counts mentioned; and as to the said sum of 20*l.*, parcel of the said sum of 56*l.* 11*s.* 8*d.*, parcel of the said money in the last count mentioned, the defendant says *actionem non*, because he says, that the said sum of 20*l.*, so found to be due to the plaintiff on an account stated, is the same sum of 20*l.*, parcel of the monies in the two first counts mentioned; and that the said two sums of 20*l.* each are the same debt, and not other and different debts. The defendant then pleaded payment of the sum of 20*l.* in full satisfaction and discharge of the said promises, as far as the same related to the said debt of 20*l.*, and of all damages sustained by the plaintiffs by reason of the non-performance thereof, and that the plaintiffs then accepted and received the same, &c.; concluding with a verification and prayer of judgment, if the said plaintiffs ought to have their aforesaid action thereof against him. Seventh plea, as to 17*l.* 17*s.* 8*d.*, parcel of the said sum of 72*l.* 3*s.* 9*d.* in the second plea mentioned, parcel of the said monies in the first and second counts mentioned; and as to the sum of 39*l.* 9*s.* 8*d.*, residue of the said sum of 111*l.* 13*s.* 5*d.* in the first plea firstly mentioned, and to which the second plea is not pleaded; and as to the sum of 17*l.* 17*s.* 8*d.*, part of the said sum of 22*l.* 3*s.* 9*d.* in the sixth plea mentioned, and parcel of the monies in the last count mentioned; and as to the sum of 39*l.* 9*s.* 8*d.*, residue of the said sum of 111*l.* 13*s.* 5*d.*, in the said first plea secondly above mentioned, to which the said sixth plea is not pleaded, the defendant says *actionem non*, because, he says, that before and at the time of the commencement of the suit, the plaintiffs were, and from thence hitherto have been, and still are, indebted to the defendant in the sum of 57*l.* 7*s.* 4*d.*, for money before then had and received by the plaintiffs to the use of the defendant, and for money found to be due from the plaintiffs to the defendant on an account before then stated between them; which said money, so due and owing from the plaintiffs to the defendant, equals the damages sustained by the plaintiffs by reason of the non-performance by the defendant of the promises in the declaration mentioned, so far as they relate to the sums to which this plea is pleaded, as in the introductory part thereof is mentioned and set out; of which said money so due and owing to the defendant as aforesaid, he the defendant is ready and willing, and hereby offers to set off and allow the plaintiffs the full amount of the said damages, *secundum formam statuti*. Special *demurrer* to the fifth plea, for that the plaintiffs had declared in assumpsit, first, in 200*l.* for work and labour; secondly, in 200*l.*

for money paid; and in 200*l.* on an account stated; and yet the defendant hath alleged and pleaded, that 20*l.* and 20*l.*, part of the three demands, are one debt of 20*l.*; that the defendant hath wrongfully attempted to confine the plaintiffs to one demand; that the said fifth plea is double, in first denying that the causes of action are different, and, secondly, pleading accord and satisfaction; that the accord and satisfaction is in satisfaction of the damages generally, and not of the damages as to the 20*l.*, and the accord and satisfaction is pleaded in bar of the cause of action, and not of the whole; nor does the plea show that the residue was a distinct demand or contract, or that it was paid or satisfied; and that the plea does not state in particular to how much of the sum in the second count the fifth plea is pleaded. Special demurrer to the seventh plea, for that the seventh plea is a plea of set-off, and in the introductory part thereof the plea is stated to be as to four several sums, amounting to 114*l.* 14*s.* 8*d.*, and yet the set-off is only a demand of 57*l.* 7*s.* 4*d.*, which is pleaded as equal to the whole, and not to a part, and is set off against the whole. *Joinder in demurrer.*

J. Bayley in support of the demurrer.—The fifth plea is clearly bad on account of the averment of identity. That objection is always valid on special demurrer. The seventh plea enumerates several sums of money, which amount in the whole to 114*l.* 14*s.* 8*d.*, as the amount of the sum claimed to which it is pleaded. It then pleads, by way of set-off to the whole of that aggregate sum, a set-off of 57*l.* 7*s.* 4*d.* only, which is a lesser sum. *Thomas* v. *Heathorn* (*a*) shows, that the payment of a smaller sum cannot be pleaded in satisfaction of a larger amount: *à fortiori*, a smaller sum cannot be pleaded by way of set-off against a larger, unless it be restricted as being a plea to a part only. Here, the smaller sum is pleaded to the whole of the larger sum, and the plea is therefore bad.

Addison contrà.—The fifth plea is unobjectionable on the ground of there being an averment of identity. It is not averred that the debts are identical, but that the sum of 20*l.*, due on the account stated, is due in respect of the same cause of action as the 20*l.* due in respect of the two first counts. *Sheldon* v. *Clipsham* (*b*) is an authority to show that the present form of pleading is good. [*Coleridge*, J.—There is another objection. The plea admits a sum to be due on the first and second counts, without specifying how much is due on each. How are the plaintiffs to know how much is admitted to be due on one count, and how much on the other?] If that be objectionable, every plea of tender which has hitherto been drawn must be equally bad; yet it has never been thought necessary to specify in a plea of tender how much is tendered in respect of each count; nor can that be necessary in this case. As to the point on the seventh plea, this case is distinguishable from *Thomas* v. *Heathorn*. Here, the sum sought to be recovered is the amount of damages sustained by the non-performance of the promise. It is, therefore, sufficient if the sum set off exceeds the amount of those damages, though it may not be sufficient to cover the whole amount claimed. In the case referred to, *Holroyd*, J. distinctly says, that "a set-off of a smaller sum is sufficient, because a part only may be set off." The

(*a*) 2 Barn. & Cress. 477. (*b*) Sir T. Raym. 449.

evidence would be precisely the same whether the plea of set-off mentioned only a smaller sum, or a sum equal, or greater in amount.

J. Bayley in reply.—The objection to the fifth plea, that it does not specify the amount of the debt claimed in the first and second counts respectively, to which it applies, has not been answered. No argument can be drawn from the mode in which it may have been customary to draw the plea of tender; the propriety of the present course may be discussed when the question is raised. The seventh plea clearly purports to set off a smaller sum against a greater. The argument on the other side rests wholly on taking the expression "damages" only, without reading the whole of the plea.

PATTESON, J. (*a*).—This is an action of assumpsit, and the declaration contains three counts, namely, for work and labour, for money paid, and on an account stated. The fifth and seventh pleas have been demurred to. The fifth plea contains an averment of the identity of several sums of 20*l.* therein mentioned. I at first thought that, on account of this allegation of the identity of the sums claimed in the different counts, the plea was bad. In declarations for trespass, where there have been two counts on different trespasses, such an allegation has always been held ground of substantial objection. But Mr. *Addison* has satisfied me, from the way in which he puts the case, that the plea is not demurrable here on that ground, for he states that that which is averred here is in effect merely that the sum of 20*l.*, in the first and second counts mentioned, is a debt arising out of the same cause of action as that mentioned in the account stated. Now the new rules have allowed a count on an account stated to be put into a declaration, though with another count on the same cause of action: so that so far there is no objection. But then there are other grounds of demurrer. This objection to the fifth plea might be given up, but another, which is also pointed out as ground for the special demurrer to that plea, is relied on, namely, that the plea does not state to how much of the sum mentioned in the two first counts respectively it is pleaded. It is contended, that it ought to point out specifically how much it is intended to cover in the first count, and how much in the second count. I think that is a good objection, for we must take the cause of action for work and labour, to be different from that for money paid. It is right that the defendant should let the plaintiff know what part of the one, and what part of the other cause of action he pleads to. The only difficulty I have felt has been with reference to the argument on the analogy of the plea of tender, which is said to apply. This mode of pleading a tender depends upon an inveterate practice; but it does not follow, when we come to a new system of pleading, or rather to the revival of the old system, that we should extend this practice to a different part of the system of pleading. On the contrary, it seems to me right, that in a plea of set-off the defendant should distinctly point out to what part of the demand his set-off is meant to apply. This one objection on the fifth plea is quite sufficient to call on us to give judgment for the plaintiffs on that plea: and that being so, I do not think it necessary to enter into the consideration of the other objections applicable to that plea. With respect to the seventh plea, the principal

(*a*) Lord *Denman*, C. J. was absent.

objection is, that the plea is pleaded as to a large sum of money, namely, the sum of 114*l.* 14*s.* 8*d.*, and the set-off only equals half that amount, alleging that the half is equal to the damages sustained by the plaintiff, so that it is a plea of set-off of a smaller against a larger sum of money, and that too not by way of deduction but of equivalent. I have rarely seen such a plea of deduction. The sum stated is immaterial, both in the declaration and in the plea, and generally there is a larger sum stated in the plea than in the declaration. That is to enable the defendant to show what is really due to him, and to enable him to set off what is so due against what is claimed against him. I do not know that it was necessary to say that the sum claimed to be set off exceeded the damages stated in the declaration, for the plea might be in the form of a plea by way of deduction. It may be necessary now perhaps that it should be so, but I have not seen any plea of that kind. Mr. *Addison* says, that the plea in this case is not inconsistent on the face of it, for he says, "though I have to answer a claim of 114*l.* 14*s.* 8*d.*, I do not admit that such a claim is good, but I assert that I have a claim of 57*l.* 7*s.* 4*d.*, and that that claim is equal to the damages which you have in reality sustained from the breach of my promise." That is certainly a new way of pleading a set-off. The defendant admits, for the purposes of the plea, the facts stated in the declaration, but if he selects a portion of the plaintiffs' demand, it must be taken that he admits the amount there stated to be due, and he should plead a set-off equal in amount to what is thus admitted to be due. If he means to admit only so much as is equal in amount to the amount of his set-off, he should have pleaded it so; otherwise he appears to treat the demand as a demand of unliquidated damages, and then he cannot plead a set-off against unliquidated damages at all. This plea might be good in this way. Suppose that the sum had been stated in the first count, and then that there had been an account stated, he might have pleaded the identity of the sums stated in the two counts, and might have averred that he did not owe the money thus demanded. On the face of this plea, it appears to me that this is an attempt to set off a small sum of money against a larger; and that the averment to support the plea is not equivalent to an averment that no more than the smaller of these sums is due. I have looked into the case of *Thomas* v. *Heathorn*, and I am of opinion that the present case falls within the principle of that decision. I do not think that the allegation in this plea can be considered as an averment that no more than 57*l.* 7*s.* 4*d.* is due to the plaintiffs, and that the defendant has a set-off to that amount; and I am therefore of opinion that there must be judgment for the plaintiffs on the demurrer to the seventh plea.

WILLIAMS, J.—I am of the same opinion. The defendant says, that he admits the sum of 114*l.* 14*s.* 8*d.* to be due as a debt, and then he seeks to extinguish it by setting off a claim of his own for a less sum. He admits, however, that this might be an insufficient answer, but that it is in effect pleading that the damages sustained by the plaintiffs are not equal in amount to more than the smaller sum. If he means the damages in general claimed in the declaration, the payment of this smaller sum would be no discharge at all. If he means the damages really sustained, he should have pleaded that in terms. It seems to me, therefore, that the seventh plea is bad. With respect to the fifth plea, there is one objection to it which is decisive. The

King's Bench.

MEE v. TOMLINSON.

defendant has chosen to say that a certain sum is due in respect of the two first counts; he should have said how much is due upon the one, and how much upon the other.

COLERIDGE, J.—I have nothing to add to what my brother *Patteson* has already said as to the seventh plea, except this, that I cannot conceive an objection to a plea of set-off in the way of deduction; and, since the new rules, I have seen pleas of payment as to part, and set-off as to the residue, pleaded without objection. I do not see how it is possible to sustain the fifth plea. I was afraid that it would prove to be bad when the thing came to be argued upon principle, for there was no practice to support it, and it is clearly contrary to principle. The plaintiff has a right to know, when he claims to have the causes of action, how much the defendant admits to be due upon the one, and how much upon the other. When that difficulty was put, no answer on principle could be given. The only thing that could be said was to refer to the practice upon the plea of tender. On that plea any objection of this sort would be met by the inveteracy of the practice; and that plea, as now pleaded, must therefore be considered to have become a recognized irregularity; but though that is so in one case, it does not follow that we should extend our favour to the irregularity itself, so as to recognize it in another instance. The whole plea is a new attempt at pleading a set-off in a new manner, which does not deserve the favour of the Court, and I for one am not disposed to treat it with favour.

Judgment for the plaintiffs.

The KING *v.* The JUSTICES OF SUFFOLK.

It is not by the 4 & 5 *W.* 4, c. 76, s. 79, compulsory on an appellant parish against an order of removal, to give notice of appeal within twenty-one days after notice of the order of removal being made.

RULE for a mandamus to be directed to the Justices of *Suffolk*, commanding them to enter appearances, and hear an appeal against an order of removal. Notice of the order of removal was received by the appellant parish, on the 18th *September*. On the 9th *October*, a notice of appeal was given to the Borough Sessions. On the 13th *October*, this being discovered to be erroneous, another notice of appeal to the County Sessions was given. On the 23d *October* the sessions were held. The notice of appeal was in sufficient time, according to the old law, and the only question was, whether under the terms of the 4 & 5 *Will.* 4, c. 76, s. 79, (*a*) the notice of appeal

(*a*) By s. 79, "No poor person shall be removed or removable under any order of removal, from any parish or workhouse, by reason of his being chargeable to, or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed. Provided always, that if such overseers or guardians shall, by writing under their hands, agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the period of twenty-one days may not have elapsed. Provided also, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish, from which such poor person is directed in such order to be removed, within the period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or in case such appeal shall be duly prosecuted, until after the final determination of such appeal."

ought not to have been given before the expiration of twenty-one days after the receipt of the notice of the order of removal.

B. Andrews showed cause, and contended that an alteration in the law had been effected by the 4 & 5 *Will.* 4, c. 76; and that s. 79, as explained by s. 81, (*a*) must be interpreted to be compulsory on the appellant parish to give notice of appeal within twenty-one days after receipt of notice of the order of removal.

Thesiger contrà, contended that the statute made no alteration as to the time within which the notice should be given; and that the only object of the legislature was to prevent an actual removal until after the expiration of twenty-one days. He was stopped.

Lord DENMAN, C. J.—Upon a purview of what appears to have been the intention of the legislature, I am of opinion that no alteration has been made as to the time within which notice of appeal must be given, as it appears to me the practice remains as it did before. I think, therefore, that the notice in the present case was sufficient.

PATTESON, J.—It appears to me that the only effect of the provision as to the twenty-one days, is to prevent the removal of a pauper until the expiration of twenty-one days, unless something is done by the parish to whom the order of removal is directed, showing an intention to yield to the order. If they allow twenty-one days to elapse without giving any notice of appeal, then the removing parish may remove the pauper at once. That seems to be the only consequence of not giving any notice within twenty-one days. The Act, therefore, does not compel the appellant parish to give the notice of appeal within twenty-one days, and take away the right to appeal, if it be not given within that period.

WILLIAMS, J.—I am of the same opinion. I conceive the only novelty introduced by the statute is the non-removal of the pauper until after the expiration of twenty-one days. The question what is proper and timely notice stands as it did before.

COLERIDGE, J.—I think that it would not be a correct interpretation of the 79th section, to make it compulsory in its direction on the appellant parish to give notice of appeal within twenty-one days. The mischief intended to be prevented by the Act, was the *de facto* removal of paupers after the order made, before the other parties had had time to consider whether or not the order would be acquiesced in. The question as to the time within which notice of appeal is to be given, remains as it was before. This rule must, therefore, be made absolute.

Rule absolute.

(*a*) Sect. 81, requires a statement of the grounds of appeal to be given.

Wightman for the plaintiffs. The assignees would be entitled to recover the two bills which were changed at *Gloucester*, if they had been presented at the *Bank of England* itself. They are equally entitled, though the bills were presented at a Branch Bank of that establishment. The defendants have, by their agents, incurred the responsibility of paying the assignees; for the indorsement, after an act of bankruptcy, passes no property to those who have reason to know that an act of bankruptcy has been committed. *Thomason* v. *Frere* (*a*), *Pinkerton* v. *Adams* (*b*). That was the law at the time that case was decided; but since the passing of the last Bankrupt Act (*c*), a new term has been introduced, and it must now be shown that the indorsee had notice. The defendants had notice of the facts on the 8th of *April*, and yet they, by their agents, changed these bills on the 12th of that month, four days after notice was given them. That would be the argument as against the defendants themselves, if the bills had been paid by them in *London*. The other part of the case arises from the bills being presented, not in *London*, but at the Branch Bank at *Gloucester*. That raises the question, whether notice given to the *Bank of England* itself is not a valid notice with respect to the Bank, as to all the places in which it carries on business. Before the passing of 7 *Geo.* 4, c. 46, it was doubtful whether the *Bank of England* could carry on business by Branch Banks in different parts of the country. The 15th section of that Act gave the power to do so. There is nothing in that Act which prevents a notice to the chief Bank, from being binding upon it for all its Branch Banks. It is not sufficient for the head-office to say that it would be inconvenient to send accounts of these notices to all the Branch Banks in the country. It would be much more inconvenient for a particular individual to be called upon to do so. The Bank knows who are its agents, the individual has no such knowledge. It was the duty of the principal Bank to send instructions to the Branch Banks of the fact; and the not doing so, is a case of negligence for which the Bank must suffer. *Mayhew* v. *Eames* (*d*) shows, that if this were an ordinary case of principal and agent, the notice in this case would be sufficient. The general rule of law applies here, that where one of two parties must bear a loss, it shall fall upon him who has been guilty of negligence. After the decision of the Court in *Cash* v. *Young* (*e*) and *Hill* v. *Farnell* (*f*), the plaintiffs cannot, perhaps, support the claim to the bill changed by *Tugwell* & Co.

Maule, contrà.—Where money passes in exchange for an instrument, which is handed over at the time by the bankrupt to the party receiving it, that is a payment protected by the 82d section of the Bankrupt Act (6 *Geo.* 4, c. 16,) unless such party can be fixed with knowledge of the bankruptcy. The 82d section of the last Bankrupt Act is an extension of the benefit of protection given by the former Acts to payments, where they are made *bonâ fide*; though even before then, the judges had been in the habit of giving a larger and more liberal construction to those statutes than in former years; *Wilkins* v. *Casey* (*g*). So they have endeavoured to put the most liberal construction upon the present statute; *Hill* v. *Farnell* (*f*). This was not a payment

(*a*) 10 East, 418.
(*b*) 2 Esp. 611.
(*c*) 6 *Geo.* 4, c. 16, s. 82.
(*d*) 3 Barn. & Cress. 601.
(*e*) 2 Barn. & Cress. 413.
(*f*) 9 Barn. & Cress. 45.
(*g*) 7 Term Rep. 711.

by the *Bank of England*, but an exchange of one article against another. It was a matter capable of being made the subject of transfer, as it would have been between any two other individuals. To make the defendants liable in this case, the plaintiffs must show a special authority by them to their agent to pay these notes: otherwise it is impossible to doubt that this was a mere transaction of transfer of *Norcliffe's* interest in these bills to the Branch Bank. With respect to the notice of the act of bankruptcy being binding on the defendants, not only for themselves, but for their general agents, that is declared not to be so in *Foster* v. *Pearson* (*a*). That case turned on the authority of a bill-broker, who had bills put into his hands in the course of his ordinary business. It was there said that the rule of law had long been considered to be that the holder of a bill of exchange—and a bank post bill is of exactly the same kind—may always recover where fraud cannot be proved against him, or where the instrument is not absolutely void; and that it might well be doubted whether that rule had been wisely departed from, in cases where attempts appeared to have been made to narrow the rights of the holder within stricter limits. It is not the duty of the Bank Directors to give a copy of every notice received by them to all the Branch Banks throughout the country. To establish such a rule will work a great public inconvenience. The Court will not readily lay down any such objectionable rule.

Wightman in reply cited *Coles* v. *Wright* (*b*).

Lord DENMAN, C. J. in this term (*November* 23d) (*c*) delivered judgment.—This was an action of trover to recover the value of three bank post bills for 500*l.* each, all of which were in the possession of *Norcliffe* at the time when he committed an act of bankruptcy, by absconding on the 12th *March*, 1833. All of them he disposed of after the act of bankruptcy, and before the issuing of the fiat, which took place within two months from the act of bankruptcy, viz. on the 18th *April*. On the 16th *March* notice was given to the *Bank of England*, in *London*, that *Norcliffe* had absconded from his creditors with the bills; and on the 8th *April* further notice was given to the *Bank of England*, in *London*, that the necessary documents for a fiat in bankruptcy against *Norcliffe* were expected by every post. One bill was passed by the bankrupt on the 11th *April* to Messrs. *Tugwell* and Co., bankers, at *Bath*, who gave cash for it, and from them it passed through several other hands, and ultimately came to the *Bank of England* Branch Bank at *Bristol*, on the 31st *May*, 1833. Messrs. *Tugwell* and Co. had no notice of any act of bankruptcy committed by *Norcliffe*. With respect to the bill passed to them, the only question is, whether the case comes within the 82d section of 6 *Geo.* 4, c. 16, as a payment *bonâ fide* made to the bankrupt, and therefore valid. Now the cases of *Cash* v. *Young*, and *Hill* v. *Farnell*, have established the position, that a purchase of goods for ready money, paid at the time, comes within the purview of that section: and we see no reason why the taking of a bank post bill for which cash is given at the time should not be equally within it. Messrs. *Tugwell* and Co., therefore, acquired a property in the bill, and could pass the same to others. It follows, that the plaintiffs cannot maintain this action as to that bill: and indeed that point

(*a*) 1 C. M. & R. 849.
(*b*) 4 Taunt. 198.
(*c*) The case was argued in *Trinity* Term.

K. B. 1824.

WILLIS v. BANK OF ENGLAND.

seems to have been conceded in the course of the argument. The other two bills were delivered by *Norcliffe*, indorsed in blank to Mr. *Smallridge*, at *Gloucester*, on the 12th *April*, in order that he might obtain cash for them from the Branch Bank at *Gloucester*. *Smallridge* being acquainted with the agent there, obtained cash for the bills from the Branch Bank, and by his direction indorsed the bills, "Pay the Governor and Company of the *Bank of England*. *J. Smallridge*." *Smallridge*, however, was merely agent for *Norcliffe*, to whom he immediately handed over the cash, and had no interest of any kind in the bills. He had no notice of any act of bankruptcy committed by *Norcliffe*, nor had the agent at *Gloucester*. It is contended—and we think rightly—that these bills were not presented for payment at the Branch Bank: for though the 7 *Geo.* 4, c. 46, s. 15, requires that bank post bills issued by the Branch Banks shall be payable there as well as in *London*, yet the converse is not enacted, and bank post bills issued in *London* are not payable at the Branch Banks. They were presented, as they might have been to any other bankers, asking for change. Still the question is, to whom were they presented and delivered at *Gloucester*? And the answer is undeniable, that they were presented and delivered at the *Bank of England* (the defendants) at *Gloucester*, not to the individual who was their agent there—as an individual. The *Bank of England* carry on business at *Gloucester* by the agent, who in the terms of 7 *Geo.* 4, c. 46, s. 16, was carrying on the banking business there for and on behalf of the said Governor and Company. The money paid for the bills was the money of the *Bank of England*, and the bills were indorsed to the *Bank of England*. The transaction at *Gloucester* took place therefore between the defendants, by their agent, on the one hand, and *Norcliffe*, by his agent (*Smallridge*), on the other. Without the aid of the 82d section of the Bankrupt Act, 6 *Geo.* 4, c. 16, no property in the bills would pass to the defendants from *Norcliffe*, on account of the previous act of bankruptcy; and the payments by the defendants to him, whether made by way of purchase of the bills, or by way of discharging their liability as acceptors, can only be protected under the 82d section, provided they had no notice of any act of bankruptcy committed by him. This reduces the case to the question, what was the effect of the notices to the *Bank of England* in *London*? We are clearly of opinion that those notices taken together (even if any doubt could be raised as to the first) amount to notice of an act of bankruptcy committed by *Norcliffe*. The general rule of law is, that notice to the principal, is notice to all his agents, (*Mayhew* v. *Eames*): at any rate, if there be reasonable time —as there was here—for the principal to communicate that notice to his agents before the event which raises the question happens. We have been pressed with the inconvenience of requiring every trading company to communicate to their agents every where whatever notices they may receive; but considering that direct notice was in this case given to the defendants themselves, of the bankruptcy of the holder of the bills, we steer clear of the doctrine (lately much disputed) of negligence or imprudence in the party receiving negotiable instruments for consideration and without fraud. The argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions; and if it were, other inconveniencies of a more serious nature would obviously grow out of a different decision. For these reasons we are of opinion that the plaintiffs are entitled to recover the value of two of the bills in question, but not of the third.

Verdict reduced to 1000*l.*

ROGERS *v.* HUMPHREYS.

REPLEVIN. The defendant avowed the taking as a distress for rent, due from the plaintiff to the defendant; and averred that it became due on the 20th *May* and the 20th *November* in every year. *Plea* in bar, *non tenuit*. The cause was tried at the *Spring* Assizes for *Salop*, 1834, before *Patteson*, J., and a verdict found for the defendant for 150*l*., the amount of the rent in arrear, subject to the opinion of the Court upon the following case, upon which the question was, whether the defendant was entitled to distrain:—

By indentures of lease and release, dated 24th and 25th *September*, 1830, the latter being made between *Elizabeth Rogers*, widow, (who was tenant for life of the premises thereby conveyed,) of the first part; *Milward Rogers*, (tenant in tail of the same premises,) of the second part; *William Henry Rosser* (tenant to the præcipe for suffering a common recovery,) of the third part; *John Williams* (demandant in the said recovery,) of the fourth part; the defendant of the fifth part, *William Humphreys* and *John Lloyd* of the sixth part, and *Thomas Lloyd* of the seventh part.

After reciting (*inter alia*) a loan by the defendant to *Milward Rogers* of 800*l*. it was witnessed, that for barring all estate tail, &c. of the hereditaments thereinafter mentioned, the said *Elizabeth Rogers* and *Milward Rogers* did convey to the said *W. H. Rosser* the premises in respect of the occupation of which the distress was made, to the intent that he might become tenant to the præcipe for suffering a common recovery, wherein the said *John Williams* should be demandant, the said *W. H. Rosser* tenant, and the said *Milward Rogers* vouchee. Covenant, that the said recovery should enure to the use of *William Humphreys* and *John Lloyd*, their executors, &c., for 1000 years, upon the trusts and purposes, &c., thereinafter expressed of and concerning the same. And from and immediately after the determination of the said term, and in the meantime subject thereto, and to the trusts thereof, to the use of the said *Elizabeth Rogers* for life, without impeachment of waste, with remainder to the use of the said *Thomas Lloyd*, his executors, &c., for the term of 2000 years, to commence from the day of the decease of the said *Elizabeth Rogers*, upon the trusts thereinafter declared, with remainder, and in the meantime and subject thereto, and to the trusts thereof, to such uses as the said *Milward Rogers* should appoint by any deed or deeds, writing or writings, with or without power of revocation, and to be executed as therein mentioned, with the consent of the parties therein named, in manner therein mentioned; and in default of any such disposition, limitation, and appointment, and so far as the same, if incomplete, should not extend, to the use of the said *Milward Rogers* for life, without impeachment of waste, with re-

1. If a lease be granted by a mortgagor prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had: and his remedy must be on the lease as assignee of the reversion, so long as the lease is in existence, and the tenant acknowledges his title. If, however, the lease be subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrongdoers, and may bring ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them. If the tenant choose to pay the rent to the mortgagee, and he accepts it, a relation of landlord and tenant is created between the mortgagee and the tenant; and the remedy of the mortgagee will depend upon the particular circumstances of each case.

2. No notice is necessary to be given by the mortgagee that he means to proceed against tenants when they have come in subsequently to the mortgage, because in such cases their title is wrongful as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary.

3. By a deed of settlement a mortgage term of 1000 years was created, and lands settled to *E. R.* for life, subject thereto, with divers remainders over. The deed contained a power to *E. R.* to lease for ten years, or for seven years, to commence from her death. She demised under the power for seven years from her death, reserving the rent to the person who should be entitled for the time being to the freehold or inheritance:—*Held*, that the trustees of the term for 1000 years were the parties entitled to the reversion; and, consequently, that their assignee might distrain on the lessee:—*Held* also, that the fact of the trustees having joined in an ejectment against the lessee, which was still pending, did not prevent such distress.

King's Bench.

ROGERS v. HUMPHREYS.

mainder to the use of trustees to preserve contingent remainders, with remainder to the use of the said *Milward Rogers* in tail general, with remainder to the use of the daughters of the said *Milward Rogers* in tail general, with divers remainders over, and with the ultimate remainder to the right heirs of the said *Milward Rogers*.

And as to the said term of 1000 years, it was agreed and declared between and by the parties thereto, that the same was so limited to the said *William Humphreys* and *Thomas Lloyd*, upon trust on non-payment by *Milward Rogers* of the said sum of 800*l.* and interest on the 25th *March* then next to the said defendant, that it should be lawful for the said *William Humphreys* and *Thomas Lloyd*, by sale, mortgage, or other disposition of the premises comprised in said term of 1000 years, at the request of the defendant, to be expressed in writing, to levy the said sum of 800*l.* and interest, and pay the same to him. And as to the said term of 2000 years to raise and levy, by the ways directed as to the said term of 1000 years, all such sums of money as the said *Elizabeth Rogers* should during her life pay to the said defendant on account of interest in respect of the said sum of 800*l.*; and also the further sum of 600*l.* and interest, and to pay the same in manner therein mentioned. And upon further trust to permit and suffer the person or persons to whom the next and immediate reversion or remainder expectant on the said term of 1000 years of and in the premises therein comprised should for the time being belong, to receive the residue of the rents and profits which should remain after and not be applied towards the execution of the trusts thereby declared of the term of 1000 years: with a proviso that when the trusts of the said terms of 1000 years and 2000 years should have been fully executed and become unnecessary, and the costs of the said trustees should have been paid, the same should cease and be void. And it was further, by the said indenture, declared and agreed, that it should be lawful for the said *Elizabeth Rogers* to demise or lease all or any part of the said hereditaments and premises thereby released, for any time not exceeding ten years from the day of the date of the said indenture, or seven years from the day of the decease of the said *Elizabeth Rogers*, to take effect in possession, so as there should be reserved in such lease, the best rent that could be gotten for the same, without taking any premium for the making thereof: and so as there should be contained in any such lease, a condition for re-entry on non-payment of the rent for the space of thirty days: proper and usual covenants from the lessee and lessees for the cultivation and management of the said lands and premises according to the best and most improved husbandry, and for the keeping and leaving of dwelling-houses and buildings, hedges, ditches, and fences, of and belonging to the said hereditaments and premises in good and tenantable repair: and so as the lessee or lessees should execute a counterpart or counterparts of such lease or leases, and should not be made dispunishable for waste by any words in the said indenture contained; and covenants by the said *Milward Rogers* for his heirs, executors, and administrators, with the said *W. Humphreys* and *T. Lloyd*, their executors, administrators, and assigns for title. And that in default of payment of said sum of 800*l.* they, their heirs, executors, administrators, and assigns, might thenceforth into and upon all and every the said hereditaments enter, and the same peaceably and quietly have, hold, occupy, possess, and enjoy, receive and take the rents and profits thereof in manner thereinbefore mentioned, without any lawful let, suit,

&c., whatsoever, of, from, or by the said *Elizabeth Rogers* and *Milward Rogers*, her and his heirs and assigns, or any person whomsoever having or lawfully and equitably claiming, or who should or might have any estate, &c. in or out of the said hereditaments. A recovery was duly suffered in pursuance of the last-mentioned deed. By indenture made the 13th *June*, 1831, between the said *Milward Rogers* of the one part, and *Jeffery Poole* and *David Poole*, executors of *Thomas Summersfield*, of the other part, after reciting the aforesaid deed of settlement of the 25th of *September*, 1830, in consideration of the sum of 200*l.* *Milward Rogers*, in pursuance and in exercise and execution of the power and authority given and reserved to him in and by the said indenture, did direct, limit, and appoint the premises aforesaid, to the use and behoof of the said *Jeffery Poole* and *David Poole*, their heirs, executors, administrators, and assigns, for ever, to secure the repayment of the said sum of 200*l.*, subject nevertheless to the life estate of the said *Elizabeth Rogers*, and also to the said mortgage to the said *John Humphreys* for securing the said sum of 800*l.* and interest, and also subject to a proviso for redemption as therein mentioned. By indenture of lease dated 17th *September*, 1831, made between the said *Elizabeth Rogers* of the one part, and the plaintiff of the other part, after reciting the said indentures of 24th and 25th *September*, 1830, the said *Elizabeth Rogers*, by virtue of the power given her by the said last-mentioned deed, demised to the plaintiff the premises aforesaid, for the term of seven years, to be computed from the day of the decease of the said *Elizabeth Rogers*, (paying unto said *Milward Rogers*, or to the person or persons who for the time being should be entitled to the freehold or inheritance of the demised premises immediately expectant on the decease of the said *Elizabeth Rogers*,) the yearly rent of 150*l.* by two equal half-yearly payments; the first payment to be made at the end of six calendar months next ensuing the day of the decease of the said *Elizabeth Rogers*. The said *Elizabeth Rogers* died on the 20th *November*, 1831, leaving the said children, *Martha*, *Margaret*, *Mary*, and *Edward Cooke*, her surviving, when the said lease commenced in point of computation, and the plaintiff took possession under it, and continued in possession till the time the distress was taken. The said *Milward Rogers* died on the 25th *June*, 1832, leaving an infant daughter, *Emma Rogers*, him surviving, without having exercised the power of appointment given him by the indenture of 25th *September*, 1830. By indenture dated 30th *July*, 1832, the said *W. Humphreys* and *T. Lloyd* assigned to the defendant the said term of 1000 years, and the said *T. Lloyd* assigned to a trustee for him the said term of 2000 years. In the month of *October*, 1832, *Henry Rogers* paid to *Mary Rogers*, the widow of *Milward Rogers*, the sum of 75*l.* on behalf of the plaintiff, being one half-year's rent due under the said lease from the death of *Elizabeth Rogers* on the 22d *November*, 1831; and at *Christmas*, 1832, the said *Henry Rogers* tendered another half-year's rent to the said *Mary Rogers* on account of the said plaintiff, which was not accepted. In *Michaelmas* term, 1832, an ejectment was brought, and which is now pending upon the demises of the said *Emma Rogers*, and of the said *Mary Rogers*, *John Goolden*, and *William Menlove*, the guardians of the persons and estate of the said *Emma Rogers* jointly, and of the said *W. Humphreys* and *T. Lloyd*, against the said plaintiff in this action, and his tenants, to set aside the lease. The demises in the ejectment were respectively laid on the 16th day of *July*, 1832. The present plaintiff in that action claimed to hold under

King's Bench.

ROGERS v. HUMPHREYS.

the lease. The defendant's counsel objected that the issue roll in that ejectment was not evidence as against him, but the Judge received it.

R. V. Richards, (with whom was *Whately*) for the plaintiff.—He contended that the defendant, under the circumstances detailed in the case, was not entitled to distrain. He cited *Moss* v. *Gallimore* (*a*), *Alchorne* v. *Gomme* (*b*), and *Pope* v. *Biggs* (*c*), on the question of the right of a mortgagee to distrain on a tenant of the mortgagor. He also cited *Doe* d. *Fisher* v. *Giles* (*d*), *Doe* d. *Rogers* v. *Cadwallader* (*e*), *Doe* d. *Raby* v. *Maisey* (*f*), *Keech* d. *Warne* v. *Hall* (*g*), and *Thunder* d. *Weaver* v. *Belcher* (*h*), to show that the situation of a party becoming a tenant subsequently to a mortgage is that of a trespasser.

Talfourd, Serjt., (with whom was *Martin*) *contrà*.—He cited *Doe* d. *Courtail* v. *Thomas* (*i*), and *Doe* d. *Rogers* v. *Rogers* (*k*), to show that the term for 1000 years created by the deed of settlement was subservient to the leasing power. He also cited *Isherwood* v. *Oldknow* (*l*), *Sacheverel* v. *Frogate* (*m*), and *Co. Lit.* 47, *a*, to show that the trustees under the deed of settlement, and, consequently, their assignee, the defendant, were the parties entitled to the reservation of the rent under the leasing power; and that the defendant being the reversioner, was incidentally entitled to distrain.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (*November* 23) (*n*), gave judgment. After stating the pleadings and the facts as they appear in the case, he proceeded.—A great many cases were cited to show what the rights of a mortgagee are as against the mortgagor, and those claiming under him, where there is a lease prior to the mortgage, and arrears of rent due; and also what they are where there is a lease subsequent to the mortgage. Those cases it is not necessary to mention, or to comment upon, as they establish this principle—that if the mortgagor himself remains in possession, the remedy against him on default in payment at the day is by ejectment; and if there be a lease, and such lease be prior to the mortgage, the mortgagee has the same remedy against the lessee or those claiming under him, as the mortgagor would have had, and no other; and his remedy must be upon the lease as assignee of the reversion, so long as the lease is in existence and the tenant acknowledges his title. But if the lease be subsequent to the mortgage, then the mortgagee may treat the lessee, and all those who may be in possession, as wrong-doers, and bring an ejectment; but he cannot distrain, or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between him and the tenants, unless they have chosen to pay rent to the mortgagee, and he has accepted it. In that case, there is the relation of landlord and tenant created between the mortgagee and the tenants: so that the remedy of the mortgagee will depend upon the particular facts of each case. No notice is necessary to be given by the mortgagee that he means to proceed against such tenants, when they come in subsequently to the mort-

(*a*) 1 Doug. 279.
(*b*) 2 Bing. 54.
(*c*) 9 Barn. & Cress. 245.
(*d*) 5 Bing. 421.
(*e*) 2 Barn. & Adol. 473.
(*f*) 8 Barn. & Cress. 767.
(*g*) 1 Doug. 22.
(*h*) 3 East, 449.
(*i*) 9 Barn. & Cress. 289.
(*k*) 2 Nev. & Man. 550.
(*l*) 3 Maule & Selw. 283.
(*m*) 1 Ventr. 161.
(*n*) The case was argued in *Hilary* Term, 1835.

gage, because in such case their title is wrongful as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary. But this case differs from all the cases cited, for here the lease is neither prior nor subsequent to the mortgage, but is in point of law contemporaneous with it; for though the lease is not in fact made until *September*, 1831, nearly a year after the mortgage, yet as the lease is made under a power, it is referable to the instrument creating the power, and is derived out of it, and has the same effect as if it had been made under the instrument itself. It is to be considered, in the first place, whether being made conformably to the power as to the rent and other requisites, the lease is to be regarded as binding on the trustees of the term for 1000 years, so as that they could not disturb the lessee in the enjoyment of the land, and we have no doubt but that it is binding on them. They are parties to the deed under which the lease is authorized to be executed—they assent to it and give it confirmation, and, therefore, they cannot disturb the lessee; they are not indeed entitled to an estate of freehold or inheritance in the technical sense of these words. We think the reservation is not to be so confined, but that if they are entitled to receive the rents, the reservation was sufficient to give them a legal interest therein, and that the trustees might have distrained for the rent; and that their legal interest being assigned to the defendant *J. Humphreys*, he may do so. But it is alleged for the plaintiff, that even supposing the defendant had otherwise a right to distrain, he is precluded from doing so by having treated the plaintiff as a trespasser, manifested by the trustees—before the assignment to *John Humphreys* the defendant, having joined with some of the family of the *Rogers'* in bringing an action of ejectment. In that action, however, the right of entry is denied by the present plaintiff, the parties are at issue upon it, and the matter is undecided. There are many cases where the conduct of a party is taken into consideration, where the question is, whether the person against whom he seeks to enforce his claim, is to be treated as a person liable upon a contract, or as a trespasser; but here is a lease executed under the seal of the plaintiff, and as long as he continues in possession, he is liable to the payment of the rent, which payment may be enforced by the usual remedies which the law gives for the recovery of it. If he had been actually evicted by a person claiming by title, or if the lessor or those claiming under him, or in this case, if the trustees under the 1000 years' term had entered upon the plaintiff, that would have been a good answer to the avowry; but in the present case there is not even a judgment in the ejectment. And there being no eviction or re-entry or surrender of the term, the lease is in existence, and there is nothing to prevent the defendant from avowing. There is a very short abstract of the avowry; in the special case it is not stated for what length of time the claim is made, but it is to be collected from the amount found by the verdict that it is for a year, but this defendant can only claim for half-a-year, for the trustee did not assign to him till after a half-year's rent had become due (*a*).

Judgment for the defendant.

(*a*) This is a mistake. Subsequently, in *Hilary* term, 1836, *Whately* obtained a rule nisi to amend the judgment, by increasing the amount from 75*l.* to 150*l.* for one year's rent, on the ground that it was a mere misprision. *R. V. Richards*, in showing cause, contended that no amendment could be made after the term in which judgment had been given. The Court however made the rule absolute.

King's Bench.

BLANCHARD *v.* BRIDGES.

1. The right to unobstructed access of light and air through a window, does not extend to access through a substituted window in the same wall, varying in size, elevation and position.

2. Where the owner of adjoining land is a party to the deed, by which a house, with certain windows in it, together with a portion of the adjoining land, is conveyed, no licence or covenant not to obstruct the access of light and air as then enjoyed, is to be inferred from that circumstance.

3. Where the owner of adjoining land witnesses, without objection, alterations in the windows, there is no agreement on his part to be inferred at any time before the expiration of twenty years, not to obstruct the access of light and air, by building up to the extremity of his land.

CASE for obstruction to windows and injury to a house. *Plea:* not guilty.

At the trial before *Bosanquet*, J. at the *Spring* Assizes for *Hants*, 1834, a verdict was found for the plaintiff, subject to a case in which the following facts were stated:—*Wm. Rolph* being seised in fee of a field called *Seven Acres*, within the manor and tything of *Portswood*, within the town and county of the town of *Southampton*, and wishing to sell it in building lots, by deed of feoffment (with livery of seisin,) dated 15th *May*, 1816, made between *Wm. Rolph* of the first part, *John Primer* of the second part, *Richard Close* of the third part, and *Charles Martill* of the fourth part, for the consideration therein mentioned, did infeoff *Close* of all that piece or parcel of arable land, lying on the west side of a certain field called the Seven Acres, situate, &c. admeasuring from north to south 22 feet, and from east to west 100 feet, and bounded on the north by land of *Rolph*, occupied by *Martill;* on the east by land also of *Rolph*, occupied by *Rogers;* and on the west by a road 12 feet wide, next *Southampton Common:* together with all ways, &c easements, &c. whatever to the said piece of land appertaining: to hold to *Close*, his heirs and assigns for ever, with the usual covenants for title. *Close* occupied the land conveyed to him, for the first two or three years, as a flower garden. *Rolph* continued to occupy the remainder of the field. He proposed to sell it all out in strips for building, and marked out the land so occupied by him, and offered it for sale in lots for building, but only sold one lot to one *Elderfield*, on the east side. Three or four years ago a board was put up by *Rolph*, announcing that the land was on sale for building. The houses were not to be built in any particular manner, form, or plan. At the end of two or three years, *Close* contracted for the sale of the portion bought by him, to *Snelgrove*, who built thereon a cottage. No conveyance was ever made to *Snelgrove*. The cottage was built about 14 feet from north to south, being built to the extremity of the land conveyed by *Rolph* to *Close*, and leaving a space of 8 feet on the south side, which was used as a passage, and was fenced off from the remainder of the land in *Rolph*'s occupation, by posts and rails. There were two small windows at the east end of the cottage, and one on the west end. Subsequently *Snelgrove* contracted with *Elderfield* for the sale to him of the property in question. *Elderfield* wishing to enlarge his cottage, applied to *Rolph* to grant him more land on the south side for that purpose, which *Rolph* refused to do. *Rolph* afterwards consented to let him have 10 or 12 feet on the west side of the cottage. By lease and release, dated 11th and 12th *September*, 1822, the release made between *Close* and *Martill* of the first part, *Snelgrove* of the second part, *Rolph* of the third part, *Elderfield* of the fourth part, and *Wade* of the fifth part, reciting the feoffment of 15th *May*, 1816, and that *Snelgrove* had afterwards purchased the piece of land, and erected thereon a cottage, and had then agreed to sell the land and cottage to *Elderfield;* and that *Close*, *Martill*, and *Rolph*, at the request of *Snelgrove*, had agreed to join in conveying the same to *Elderfield:* It was witnessed, that for the consideration therein mentioned, *Close*, *Martill* and *Rolph*, at the request and by the direction of *Snelgrove*, did, and each of them did, as to all their estates in the premises, grant, bargain, sell, alien, release, and confirm, and *Snelgrove* did ratify and confirm unto *Elderfield* all

that piece or parcel of land (describing it as before), and also the messuage or cottage lately erected and built thereon, which piece or parcel of land admeasured from north to south 22 feet, and from east to west 112 feet; and was bounded on the north-east and south by land of *Rolph*, and on the west by *Southampton Common*, and had been lately occupied by *Snelgrove:* together with all ways, &c. lights, easements, &c. to the said piece or parcel of land, newly erected cottage, hereditaments, and premises belonging: to hold to *Elderfield* and his heirs. Immediately after the execution of this conveyance, *Elderfield* commenced alterations in the cottage, and employed *Kent* as the architect. *Kent* told *Rolph* what he was going to do. *Rolph* was often present whilst the work was in progress, and saw the alterations going on, but knew nothing of the plan. He knew a wall adjoining the land was intended to be built, in order to enlarge the house. The old windows on the east were merely carried out in a straight line five feet, and additions made to form them into bow windows. Part of the footings of the exterior of the new south side were built by *Kent* on *Rolph's* land. *Kent* spoke to *Rolph* about the footings after the wall was built, but not before. *Rolph* consented to their remaining, on condition that if he himself built, he should be at liberty to build up to the south wall of the cottage. Two new windows were put in on the western side, one on the old part, another on the new. The old windows were altered by putting in new mouldings: after this was done, *Kent* applied to *Rolph* for leave to put up a cornice spout projecting over his land from the southern wall, which *Rolph* consented to do, on condition that he should be at liberty to remove it when he liked, and build home to the wall. *Elderfield* occupied the cottage in its altered state without any interruption till 1828, when he let it to *Cobb*. *Rolph* continued to occupy the adjoining land, principally as arable land, and on the application of *Cobb*, who then occupied the cottage, and who wished to make a further addition to it on the north side, he, by indenture of 1st *June*, 1828, demised to *Cobb* for 21 years, at the rent of 10*l.* a year, all that piece or parcel of land, situate, &c. adjoining the dwelling-house of *Cobb*, on the north side thereof, and containing in depth from west to east 55 feet, and in breadth from north to south 14 feet 9 inches, bounded on the west by the public road leading from *Southampton* over the common to *Portswood*, on the south by the dwelling-house of *Cobb*, and on the north and east by the land of *Rolph*, and on which piece or parcel of land *Cobb* had begun to erect a chaise-house and stable: together with all and singular the easements, privileges, and appurtenances to the said piece or parcel of land belonging, or in any wise appertaining. On 28th *November*, 1828, *Cobb* assigned the last-mentioned term to *T. R. Burden*. On 30th *August*, 1831, *Burden* assigned to the plaintiff, who occupies the remainder of the premises as tenant from year to year under *Elderfield*. In 1829, *Elderfield* built a new house on that part of his land which adjoined the south side of the cottage and premises occupied by the plaintiff: up to that time the field had been used principally as arable land. A low wall belonging to the plaintiff, about 4 feet high, divided the two properties. By lease and release, dated 14th and 15th *February*, 1832, between strangers of the first and second parts, *Rolph* of the third part, and the defendant of the fourth part, reciting (*inter alia*) certain indentures of *December*, 1812, those parties, at the request and by the appointment of *Rolph*, and also *W. Rolph*, did, and each of them did, according to their several and respective interests and estates, grant, bargain, &c. unto the

King's Bench.

BLANCHARD v. BRIDGES.

defendant all that newly-erected messuage or dwelling-house, with the stables, &c. and the shrubberry in front, and the garden behind the same, the boundary of such garden being in a straight line from the south, or adjoining wall of premises belonging to Mr. *Blanchard* (the plaintiff) to &c. situate, &c. containing by admeasurement in length, on the north side 315 feet, on the east side 184 feet, on the south side 281 feet, and on the west side or front 184 feet; bounded in part on the north by premises belonging to Mr. *Blanchard*, and on the remainder part by land belonging to *Rolph*, on the east and south by, &c. and on the west by the public road, towards *Southampton Common*, formerly part of the said piece or parcel of land, called or known by the name of the *Seven Acres;* together with all houses, &c., fences &c., ways &c., easements &c., advantages, emoluments, rights, members and appurtenances to the hereditaments thereby released belonging or in anywise appertaining, and therewith usually held and occupied or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof, to hold to the defendant, his heirs and assigns. In 1832, some disagreement having arisen between the plaintiff and defendant, the latter erected, first a wooden fence, and then a brick wall, parallel and close to and extending the whole length of the plaintiff's house. The wall for 31 feet was 14 feet 6 inches high, and within two feet of the eaves of the plaintiff's house, and for the remainder of the distance the wall was 8 feet 11 inches high. Before the erection of this wall, the rooms at the east side of the cottage were light, cheerful, and healthy. The erection of the wall has materially diminished the light, and is likely to create dampness, signs of which have made their appearance on the plaintiff's wall.

Sir *W. Follett*, (with whom was *Sewell*,) for the plaintiff. No man is by law permitted to derogate from his own grant. *Rolph* here granted the land for the purpose of building a house with free access of light and air; he could not, therefore, have obstructed the windows in question. The defendant claims through *Rolph:* he is therefore equally precluded. *Palmer* v. *Fletcher* (*a*), *Cox* v. *Matthews* (*b*), *Compton* v. *Richards* (*c*), *Swanborough* v. *Coventry* (*d*), *Coutts* v. *Gorham* (*e*), *Rivier* v. *Bower* (*f*). No distinction can be taken, that in the present case the grant by *Rolph* was of land and not of a house; because it was a grant of land for the purpose of building a house; and therefore all the consequences of a grant of a house would follow. Again, as *Rolph* was clearly cognizant of the progress of the work without objection, and was afterwards a party to the subsequent conveyance, it must be taken that a licence or covenant by him for the uninterrupted access of light and air through the windows in question, must be presumed; and that such licence or covenant is either irrevocable and absolute, or determinable only under conditions of fact which have not been performed. If *Rolph* is so bound, then the obligation is equally binding on the defendant; *Bridges* v. *Blanchard* (*g*), *Hewlins* v. *Shippam*, (*h*). An action is maintainable if any part of the space occupied be obstructed; *Chandler* v. *Thompson* (*i*).

(*a*) 1 Lev. 122.
(*b*) 1 Vent. 237.
(*c*) 1 Price, 27.
(*d*) 9 Bing. 305.
(*e*) Mood. & Malk. 396.
(*f*) Ryan & Mood. 24.
(*g*) 1 Adol. & Ellis, 536.
(*h*) 5 Barn. & Cress. 221.
(*i*) 3 Camp. 80.

Smirke, contrà.—In all the cases cited as to the effect of a grant, there was a house *in esse* at the time. That circumstance sufficiently distinguishes them from the present case, where the grant was of what is called in the case arable land. *Portmore* (*Earl*) v. *Bunn* (*a*), *Right* d. *Jefferys* v. *Bucknell* (*b*), are authorities to show that where it appears by the deed that the grantor has only a limited interest, the grant must be construed as limited by the grantor's interest, though the words may be general. Even if the old windows were privileged, the new ones were not so, unless they were in precisely the same place, and of the same dimensions; *Cherrington* v. *Abney* (*c*), *Moore* v. *Rawson* (*d*). The implied licence or covenant contended for by the other side, if any thing, can only have been a mere verbal licence. That will not be sufficient: because this is an easement which only lies in grant, and cannot be by parol. *Aldred's* case (*e*), *Barker* v. *Richardson* (*f*), *Canham* v. *Fisk* (*g*).

Sir *W. Follett*, in reply, also cited *Doe* d. *Shepherd* v. *Allen* (*h*), *Doe* d. *Foley* v. *Wilson* (*i*).

Cur. adv. vult.

PATTESON, J. in the course of the term, delivered the judgment of the Court as follows:—This was a special case argued before my brothers *Williams* and *Coleridge*, and myself. The action was for darkening certain windows, and otherwise injuring the house of the plaintiff. The material facts on which our judgment proceeds are the following:—*Rolph* being a tenant in fee of a close called the *Seven Acres*, by a deed executed in 1816, and containing only the usual covenants for title, granted a portion of it in fee to one *Close*, describing it as a parcel of *arable land*. *Close* occupied this parcel as a garden for two or three years, and then contracted to sell it to one *Snelgrove*, who entered without any conveyance, and erected a cottage with two small windows at the east end, and one at the west end. *Snelgrove* being still without any conveyance, contracted to sell it to one *Elderfield*, who wishing to enlarge the cottage, procured from *Rolph* a grant of twelve additional feet on the western side of the cottage. This grant was effected by deeds of lease and release, dated respectively the 11th and 12th *September*, 1822, in which *Rolph*, *Close*, and *Snelgrove*, were granting parties, and the erection of the cottage was recited. The parties "as to all their estates in the premises," granted "all that parcel of land," and the cottage lately erected thereon, the parcel admeasuring from north to south 22 feet, and from east to west 112 feet, bounded on the north-east and south by land of *Rolph*, together with all ways, &c. lights, easements, &c. This grant of 112 feet included the premises contained in the deed of 1816. Upon the execution of this conveyance, *Elderfield* enlarged his cottage on the south side, carrying it to the extremity of his land, on ground which before had been used as a passage, and in the western end of this newly built part he inserted a small window. At the eastern end of the house he carried forward a projection about 5½ feet, terminating in bay windows, and these bay windows were substituted for, but were not in the same places, though in the same direction as

(*a*) 1 Barn. & Cress. 694.
(*b*) 2 Barn. & Adol. 278.
(*c*) 2 Vern. 646.
(*d*) 3 Barn. & Cress. 332.
(*e*) 9 Co. Rep. 58.
(*f*) 4 Barn. & Ald. 579.
(*g*) 2 Cromp. & Jervis, 128.
(*h*) 3 Taunt. 78.
(*i*) 11 East, 56.

King's Bench.

BLANCHARD v. BRIDGES.

the two former windows at the end of the house. It is for the inconvenience occasioned by darkening these three newly-made windows that the action is brought. The cottage in its altered state was occupied by *Elderfield* till 1828, *Rolph* continuing to occupy the remainder of the field, principally as arable land. In that year the cottage was let to one *Cobb*, who being desirous of making a further addition to it on the north, for the purpose of erecting a chaise-house and stable, procured from *Rolph* a lease for a term of years of a small portion of the field, described as bounded on the south by *Cobb*'s dwelling-house. The plaintiff is the assignee of this term, by an assignment in 1831, and holds the remainder of the premises as tenant from year to year to *Elderfield*. The defendant claims under a subsequent conveyance from *Rolph*, who built a dwelling-house on the field in 1829. The right to maintain the present action was rested in the argument on two grounds; first, upon the principle established, that no man should derogate from his own grant—in considering which it was rightly assumed that the defendant stood in precisely the same situation as *Rolph*: and, secondly, that from the grants above stated, coupled with certain grants to be mentioned hereafter, a licence or a covenant for the unobstructed access of light and air through the windows in question was to be presumed; and that such licence or covenant was in law either irrevocable and absolute, or determinable only under conditions of fact, which had not been performed. That the plaintiff's argument should have its full weight, it was obviously necessary to contend that no distinction is to be made between the windows in the cottage when first built, and the windows now in question, as no grant has been made by *Rolph* to those under whom the plaintiff claims, since the formation of the present windows, except by the lease of 1828. But we are of opinion that this point cannot be successfully contended. With respect to the western window, the part of the house in which it was placed had no existence until after the conveyance of 1822, the land on which the structure was afterwards raised had, up to that time, been used only as a passage. As to the windows at the east, the case finds that they do not occupy the places of the old windows: the wall in which those windows were no longer exists, and assuming that no greater change of position has been made than is necessarily consequent upon the carrying out of the side walls five feet, and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such lands, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, the right must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions, and in the same position,) which existed at the time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation. If it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence; and a party

who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance. *Chandler* v. *Thompson* is not at all inconsistent with this reasoning; there an ancient window had been enlarged in the same place, the original aperture remained, and the case only decided that that aperture remained privileged, as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, are not claimed as ancient windows, or in the ordinary way, from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinction as to the point now under consideration. The inquiry, therefore, as to the first ground on which the plaintiff's case is rested, is limited to the effect of the lease of 1828; in considering which, we are not at liberty to attach any weight to the fact that the conveyances of 1816 and 1822 proceeded from the same grantor. Now it seems a strong thing to contend that a lease for years, of some feet of land on the north side of an existing dwelling-house, for the purpose of erecting a chaise-house and stables, will in itself prevent the lessor from making erections on the south side, by which the eastern and western windows may be darkened: admitting, as we are disposed to do, to the fullest extent, the principle that no man shall be allowed to derogate from his own grant, the only grant here is the lease, and it would be extending the principle to very indirect and remote consequences, to consider the act complained of as derogating from that grant. But it is said, secondly, that the several grants by *Rolph*, coupled with his acts and declarations, amount to a licence or to a covenant that the light and air should have free access to the house, through the present as well as the former windows. In considering these, it is proper to go back to the commencement; but we are not at liberty to attach any weight to the statement that *Rolph* desired to sell *in building lots*, by which it is sought to give a character to the grant of 1816, which on its face it will not bear: unless we are allowed to alter the terms of the contract, by the introduction of previous wishes or intentions, we must regard it as a mere conveyance of *arable land;* and there is no doubt, that at any time previously to the erection of the cottage by *Snelgrove*, *Rolph* was at liberty to erect any buildings or walls in the residue of the field, which were not prejudicial to the occupation of the parcel granted away as *arable land*. Nor would the erection of the cottage make any difference in his rights, because, as to this cottage, *Snelgrove* did not claim under him. The land not having been granted for building purposes, the parties were, as to the cottage, strangers to each other; and no mere acquiescence for a shorter period than twenty years would have precluded him from obstructing the windows. It was contended, however, that the grant of 1822 altered the position of the parties, and confirmed the use which had been previously made of the land for building. By the grant itself, nothing passed from *Rolph* but twelve feet of land, although, in the same deed, the cottage with all its existing lights, is conveyed by *Close*. The alterations now in question were made subsequent to that grant; and it appears that although *Rolph* was ignorant of the precise plan intended to be adopted, yet he was often on the spot during the progress of the work, and had every means of obtaining a general knowledge of the nature of the alterations. He made no objection, but at the time reserved to

King's Bench.

BLANCHARD v. BRIDGES.

himself specifically a right to build up to the south wall. Upon the evidence of these facts, the Court (which by the agreement of the parties is to draw any conclusion which a jury might have drawn) is desired to infer that the windows now in existence were placed in their present position with such an acquiescence or consent on the part of *Rolph*, as to warrant the presumption of whatever legal instrument may have been necessary to convert the plaintiff's parcel into a dominant, and the defendant's into a servient tenement, in respect of these lights. Before however the Court will feel warranted in making such a presumption, it must consider what right or power *Rolph* had to prevent the throwing out of these windows. The fullest knowledge, with entire, but mere acquiescence, cannot bind a party who has no means of resistance. There may appear to be some hardship in holding that the owner of a close, who has stood by without notice or remonstrance, while his neighbour has incurred great expense in building upon his own adjoining land, shall be at liberty by subsequent erections to darken the windows, and so destroy the comfort of such buildings; yet there can be no doubt of his right so to do, at any time before the expiration of twenty years from their erection, and this with good reason; for it is far more just and convenient that the party who seeks to add to the enjoyment of his own land, by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well understood grant of it, from the owner of that land, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create indefinite and puzzling questions of fact, to be decided, as we daily see, by litigation. If a party who has neglected to secure to himself rights so important, by previous express licence or covenant, relies for his title to them upon any thing short of an acquiescence for twenty years, we think the *onus* lies upon him, of producing such evidence as leads clearly and conclusively to the inference of a licence or a covenant. It is difficult, perhaps impossible, to define the necessary amount of such evidence, but we are of opinion that the amount in the present case is clearly insufficient. This disposes of the action as regards the windows. With respect to the injury alleged to be occasioned by the building of the wall to the body of the house, it is sufficient to say, that when that part of the house was built, and encroached on *Rolph*'s land, it was stipulated that he should be at liberty at any subsequent time to build close up to the wall in question.

Judgment for the defendant.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term, 1836.

REGULÆ GENERALES.

HILARY TERM, 6 WILLIAM IV.

1. WHEREAS by the statute 4 *Henry* 4, c. 18, it was enacted "That all the attorneys shall be examined by the justices and by their discretion their names put on the roll, and they that be good and vertuous, and of good fame, shall be received and sworn well and truly to serve in their offices." And whereas by the statute 3 *Jac.* 1, c. 7, sec. 2, it was enacted, "That none shall from henceforth be admitted attorneys in any of the King's Courts of Record, but such as have been brought up in the same Courts, or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition, and that none be suffered to solicit any cause or causes in any of the Courts aforesaid, but only such as are known to be men of sufficient and honest disposition." And whereas by a rule made in *Michaelmas* Term, 1654, in the Courts of *King's Bench* and *Common Pleas*, it was ordered that the Courts "should once in every year, in *Michaelmas* Term, nominate twelve or more able and credible practisers to continue for the ensuing year, to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination: and the persons desiring to be admitted were first to attend with their proofs of service, then to repair to the persons appointed to examine, and, being approved, to be presented to the Court and sworn." And whereas by the statute 2 *Geo.* 2, c. 23, s. 2, it was enacted, "That the Judges, or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath, to examine and in-

King's Bench.

Regulæ Generales.

quire by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney: and if such Judge or Judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively should, and they were thereby authorized to administer to such persons the oath thereinafter directed to be taken by attorneys: and after such oath taken, to cause him to be admitted an attorney of such Court respectively." And whereas in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges in manner hereinafter mentioned: It is Ordered that the several Masters and Prothonotaries for the time being of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, respectively, together with twelve attorneys or solicitors, to be appointed by a Rule of Court in *Easter* Term in every year, be examiners for one year: any five of whom (one whereof to be one of the said Masters or Prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next *Easter* Term, subject to such appeal as hereinafter mentioned, no person shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

2. It is further Ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

3. And it is further Ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the Clerk of the Lord Chief Justice of the Court of *King's Bench*, upon which no fee or gratuity shall be received; which application shall be heard in *Serjeant's Inn Hall*, by not less than three of the Judges.

4. And whereas the Hall or building of the *Incorporated Law Society* of the United Kingdom, in *Chancery Lane*, will be a fit and convenient place for holding the said examination, and the said Society have consented to allow the same to be used for that purpose: It is further Ordered, that until further order such examinations be there held on such days, being within the last ten days of every Term, as the said examiners or any five of them shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a Term's notice to the said examiners of his intention to apply for examination, by leaving the same with the Secretary of the said Society at their said Hall; which notice shall also state his place or places of residence, or service for the last preceding twelve months; and in case of application to be admitted, on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. And it is further Ordered, that three days at the least before the commencement of the Term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's Office, as the case may be, instead of affixing the same on the walls of the Courts, as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months, and the Master or Prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables under convenient heads, and affix the same, on the first day of Term, in some conspicuous place within or near to and on the outside of each Court.

6. And whereas it is expedient that upon the re-admission of attornies the judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinue to practise, and as to their conduct and employment during the time of such discontinuance, It is further Ordered, that at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted, with the Master or Prothonotary, as the case may be, which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also at the same time cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of *King's Bench*, and the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

DENMAN.	S. GASELEE.	J. PATTESON.
N. C. TINDAL.	J. PARKE.	J. GURNEY.
ABINGER.	W. BOLLAND.	J. WILLIAMS.
J. A. PARK.	J. B. BOSANQUET.	J. T. COLERIDGE.
J. LITTLEDALE.	E. H. ALDERSON.	

HOLIDAYS AT THE LAW COURTS.

WHEREAS by the Act of the 3 & 4 *W.* 4, c. 42, s. 43, it is enacted, that none of the several days mentioned in the statute passed in the session of Parliament holden in the fifth and sixth year of the reign of King *Edward* the 6th, intituled, "An Act for keeping Holidays and Fasting Days," shall be kept or observed in the Courts of Common Law, or in the several offices belonging thereto, except *Sundays*, the day of the Nativity of our Lord, and the three following days, and *Monday* and *Tuesday* in *Easter* week: It is hereby ordered, that henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said Courts, viz.—*Good Friday* and *Easter Eve*, and such of the five days following as may not fall in the time of Term, but not otherwise: the Birth-day of our Lord the King, the Birth-day of our Lady the Queen, the day of the Accession of our Lord the King, *Whit Monday*, and *Whit Tuesday*.

(*Signed by all the above-named Judges.*)

Bail Court.

DYER *v.* LEVI.

Attornies are not bound to sue in Courts of Request, although the attachment of privilege is taken away by the Uniformity of Process Act.

THIS was an action of debt brought to recover the sum of 2*l.* 16*s.* 6*d.*, for business done by an attorney. At the trial before the under-sheriff of *Middlesex*, on the 6th *August* last, the jury gave a verdict for the sum of 1*l.* 6*s.* 4*d.* It was admitted at the trial that the parties resided, and the cause of action arose, within the jurisdiction of the Court for the recovery of small debts at *Blackheath* and the neighbourhood. A rule was obtained in *Michaelmas* Term to show cause why judgment should not be given for the defendant, and why the plaintiff should not pay treble costs to the defendant, pursuant to the several statutes of 5 *Geo.* 3, c. 8; 10 *Geo.* 3, c. 29; and 47 *Geo.* 3, sess. 1, c. iv.; and that in the meantime proceedings be stayed.

Mansel, showed cause.—The plaintiff in this case is an attorney, and when attorneys sue for their costs, they are not bound to sue in Courts of Request. This was an action for costs, and in *Tidd*'s Practice (*a*) it is laid down, that attornies may sue in their own Courts for debts under forty shillings. The Uniformity of Process Act has done away with all proceedings except by summons and *capias*, but still it appears from the indorsement of the writ itself, and from the declaration, that the plaintiff is an attorney, and is suing for business done by him as such; he, therefore, clearly is not bound by the Acts establishing this Court of Requests.

Steer, *contrà*.—There is a provision in the statute 5 *Geo.* 3, c. 8, s. 28, that no attorney is to have privilege in the Court thereby established. That would be a sufficient answer on that point, but there is also another. The Uniformity of Process Act, by doing away with all proceedings by attachment of privilege, has in effect taken away the privilege of attornies to be exempted from the operation of Acts establishing Courts of Request.

There were other points argued, which it is unnecessary to notice.

Cur. adv. vult.

LITTLEDALE, J. this term (*Feb.* 1st,) gave judgment.—This was a case argued before me last term, in which the plaintiff, an attorney of this Court, sued in the superior Court for his costs, and the cause was tried before the Sheriff on a writ of trial. The plaintiff recovered a verdict for 1*l.* 6*s.* 4*d.* A rule was then obtained to show cause why judgment should not be given for the defendant, and why the plaintiff should not pay treble costs to the defendant, pursuant to the several statutes of 5 *Geo.* 3, c. 8; 10 *Geo.* 3, c. 29; and 47 *Geo.* 3, sess. 1, c. iv. I was prepared to give judgment last term on the question as to the costs, but I took time to reconsider the case. At that time it appeared to me that the plaintiff being an attorney was not protected by his privilege, and that he ought to have sued in the Court of Requests. On further consideration of the subject, and on the authority of a case decided this term in the Court of *Exchequer* (*b*), I have, on that part of my judgment, come to a different conclusion, and think that the plaintiff,

(*a*) P. 80, 9th edit.

(*b*) *Wright* v. *Skinner*, 3 Cromp., Mees., & Rosc., 144.

being an attorney, was not bound to sue in the Court of Requests. I founded my opinion last term on the cases of *Tagg* v. *Madan* (*a*), and *Parker* v. *Vaughan* (*b*), and particularly on the first. In that case the plaintiff, an attorney, had not sued by attachment of privilege, and on an application to plead that the cause of action arose within the jurisdiction of a Court of Requests, it was said by the Court, that as the plaintiff had sued as a common person he was not protected by his privilege. The reason given was, that he had elected to sue as a common person, and had thereby waived his privilege. By the Uniformity of Process Act the attachment of privilege is taken away, but not the privilege itself. Before that statute an attorney might elect to sue as a common person, now the statute having taken away the attachment of privilege, it is not left to the option of an attorney to sue as a common person, or not, as he pleases; but then it was not the intention of the Act altogether to deprive attornies of their privilege of suing in the superior Courts. Therefore, on the authority of the case in the *Exchequer*, deciding that though the election of suing by attachment of privilege is taken away, yet the privilege itself is not, because an attorney is deprived of that election; this rule must be discharged. This decision puts an end to the other points argued in the case. The clause in the statute 5 *Geo.* 3, c. 8, that attornies are not to have their privilege in the Court thereby established, applies only to attornies who are *defendants*, who are served with process of that Court, but does not apply to plaintiffs.

Rule discharged without costs.

(*a*) 1 Bos. & Pul. 629. (*b*) 2 Bos. & Pul. 29.

RYAN *v.* FARNELL.

A Rule had been obtained to show cause why defendant's attorney should not pay him a sum of money. On cause being shown, it was referred to the Master. The Master found that a certain sum was due by the attorney to his client, and made his *allocatur* accordingly. Upon the Master's report being made, the rule which had been obtained was made absolute. The sum not having been paid,—

A rule to show cause why an attorney should not pay his client a sum of money, having been referred to the Master, who found a certain sum due, and made his *allocatur* accordingly, whereupon the rule was made absolute:—*Held*, that a rule for an attachment for the non-payment was not absolute in the first instance.

Barstow, now moved for a rule absolute, in the first instance, for an attachment against the attorney. He submitted that the case differed from the ordinary case, where an attorney is ordered to pay a sum of money, as the Master's *allocatur* has been adopted and confirmed by the Court.

PATTESON, J.—I think there is no difference, the Master is only an arbitrator, and is put in the place of the Court to ascertain the amount due. I think the parties are in the same situation as if the order had been made in the first instance by the Court (*c*).

Rule *nisi* only granted.

(*c*) Reg. Gen. *T.* T. 17 *G.* 3.

Bail Court.

OXENDON *v.* CROPPER.

After verdict for the defendant and a rule nisi for a new trial, the Court will not order the plaintiff to find security for costs, he being in insolvent circumstances and resident abroad.

WHITEHURST applied for a rule to show cause why the plaintiff should not give security for the costs incurred in this cause. The cause was tried at the last assizes, when a verdict was found for the defendant. In *Michaelmas* term the plaintiff obtained a rule *nisi* for a new trial, which had not yet come on to be argued. The plaintiff is in insolvent circumstances, and after being in prison for debt for some time got discharged, and is now living at *Paris*. This is certainly a novel case in which to apply for security for costs; but it is submitted that it is a case in which the Court will grant it. [*Patteson*, J.—It is certainly a novel case; all the costs have already been incurred except those of the argument on the new trial.]—In the case of *Lewis* v. *Ovens* (*a*), the Court granted a similar application, on a writ of error being brought.

PATTESON, J.—There the writ of error was brought for the purpose of delay, here there is a point of law to be argued. I cannot grant this application, as I must assume there is some doubt as to the verdict being right. I know of no instance where security for costs has been granted, except at the commencement of the proceedings, where the party is resident abroad. Here all the expenses have already been incurred.

Whitehurst, then asked leave to alter his motion, and to confine it to the future costs that would arise on the argument.

PATTESON, J.—I think I cannot grant that application. The only mode of enforcing the rule would be to order that the judgment should be entered up, which would be contrary to the opinion of the Court as at present expressed.

Rule refused.

(*a*) 5 Barn. & Ald. 265.

COWPER and another *v.* JONES.

On a sham plea being pleaded, the Court will not give the plaintiff leave to sign judgment as for want of a plea.

THIS was an action of debt on recognizance of bail for one *Stenburg*. The defendant pleaded, that after judgment had been recovered against *Stenburg*, and before any action accrued to the plaintiff, and before the commencement of the action, that *Stenburg* became bankrupt, according to the statutes relating to bankrupts.

Mansel, moved for a rule to show cause why the plaintiff should not have leave to sign judgment as for want of a plea. This plea is a mere sham plea, and, if true, is no answer to the action. The object of the defendant is merely to delay the cause. It is a mere trick, and the Court will grant this rule. The case of *Milcy* v. *Walls* (*b*) is an authority for this application.

PATTESON, J.—I do not know that I have power to give leave for judgment to be signed as for want of a plea. It was at one time ruled by the

(*b*) 1 Dowl. P. C. 648.

Courts, that when a sham plea was pleaded, the plaintiff should be at liberty to sign judgment as for want of a plea. Afterwards they retraced their steps and refused to allow judgment to be signed except under particular circumstances, as where the defendant is under terms, or where the plea is of such a nature as to require two different modes of trial. But where the plea is only a statement of facts, and it is suggested that they are not an answer to the action, the Court will not give leave to sign judgment as for want of a plea. The defendant must demur, and I hope some rule will be adopted to argue such demurrers early in the term.

Rule refused.

ARMSTRONG *v.* MARSHALL.

1. The Court will not set aside an award on the ground that the arbitrator has rejected certain evidence, that rejection not appearing on the face of the award.

2. In an action by a surveyor for making some plans which were inaccurate, but which had been given in evidence on the trial of a cause. *Semb.* that the effect which they had on the jury in agreeing on their verdict is not evidence.

THIS was an action by a surveyor for his expenses in making plans of some mines. The plans were made for the purpose of being given in evidence in an action of trespass between the occupiers of two adjacent mines. The plans, it appeared, were not accurate, which was accounted for by the plaintiff by the state of the air in the mines. They were given in evidence in the action of trespass, and the special jury by which it was tried had the plans by them while considering their verdict. This action by the surveyor was referred to a barrister to award what was due. At a meeting before the arbitrator, one of the special jury who had tried the action of trespass, was examined as to the accuracy of the plans, and he deposed to his own impression that they were inaccurate. On being further questioned as to the effect the plans had on the jury in agreeing on their verdict, it was objected on the part of the plaintiff, that such evidence was inadmissible. The arbitrator rejected the evidence, and ultimately made his award that the defendant should pay the plaintiff 17*l.* 2*s.* A rule was obtained last *Michaelmas* Term to show cause why the award should not be set aside, on the ground that the arbitrator had rejected this evidence.

Erle, now showed cause.—This rule cannot be supported, for two reasons. In the first place the objection does not appear on the face of the award, and all the authorities show that it cannot therefore be made. If the Court should think that argument invalid, the rule must yet be discharged; as the arbitrator was right in rejecting the evidence offered. The impressions which the plans created in the minds of the rest of the jury, or their opinions, could not possibly be evidence in the cause. Those impressions and opinions could only be derived from their conversations, which are clearly inadmissible in evidence. It is, moreover, very inexpedient to make such inquiries of the jurors who have tried a cause.

Crowder, contrà.—The question here is, whether a certain line of evidence was improperly rejected by the arbitrator. The arbitrator must have thought that the questions put related to a matter the juror was bound not to reveal. That is clearly an erroneous idea, a special jury not being bound to secresy like a grand jury. The evidence was admissible. It was material to know whether the plans were the foundation of the jury's decision. This was a question not of opinion or of conversation, but of fact. As regarded the juror

Bail Court.

ARMSTRONG v. MARSHALL.

examined, it was asking him on what he acted in giving his verdict. As regards the other jurors, their consultation together was a fact, and it was also a fact whether or not they took these plans into their consideration in agreeing on their verdict. These were facts which were admissible in evidence, and this rule must be made absolute. The objection taken, that the rejection of this evidence does not appear on the face of the award, cannot be supported. The case of *Wade* v. *Huntley* (*a*), decides that a mistake in the judgment of the arbitrator is a cause for setting aside an award. [*Patteson*, J.—The case of *Campbell* v. *Twemlow* (*b*), is conclusive against this application.]—The judgments of Lord *Tenterden* and Lord *Eldon* in the cases of *Richardson* v. *Nourse* (*c*) and *Young* v. *Walter* (*d*) are, however, in favour of this application.

Cur. adv. vult.

PATTESON, J.—The objection here made does not arise on the face of the award, and I think I am bound to decide this case on the authority of that of *Campbell* v. *Twemlow*. If parties are allowed to bring on those questions which do not appear on the face of the award, there is no saying to what extent the rule will gradually be broken in upon. It is far better to adhere to the broad principle. Therefore, without deciding the question as to the admissibility of the evidence, I must decide that I am bound by the award, and the rule must be discharged. At the same time I do not wish to have it supposed that the arbitrator was wrong; I think he was right, but this opinion is entirely extra-judicial.

Rule discharged.

(*a*) Tidd Prac. 841, 9th edit.
(*b*) 1 Price, 81.
(*c*) 3 Barn. & Ald. 237.
(*d*) 9 Ves. jun. 364.

FOGARTY *v.* SMITH.

Judgment having been recovered in a debt for 20*l.* debt and 1*s.* as merely nominal damages, the defendant is entitled to his discharge under the Small Debtors' Act.

R. BAYLY, opposed the discharge of a prisoner under the Small Debtors' Act, 48 *Geo.* 3, c. 123. The action was in debt in the Borough Court of *Plymouth*. The judgment was for 20*l.* debt, and 7*l.* 3*s.* 10*d.* damages and costs, which last sum is made up of one shilling damages and 7*l.* 2*s.* 10*d.* for costs. The question here is, whether this is a judgment for any debt or damages not exceeding 20*l.* exclusive of costs, within the meaning of the Act. The point turns on whether the one shilling nominal damages takes the case out of the statute. The Court will look to the judgment alone, from which it is clear the debt and damages exceed 20*l.* The defendant therefore is not entitled to his discharge. No distinction can be drawn between the words "debt *or* damages" and "debt *and* damages," but the former words, which are those used in the Act, imply the same as if the latter had been used. The cases of *Cooper* v. *Bliss* (*e*), and *Doe* v. ——— (*f*), show that the sum for which the party is in execution is that to which the Court will look.

Mansel, contrà.—This case is within the Act, which refers to two species of demands. If the action is in assumpsit, the *damages*, which is the substantial

(*e*) 2 Dowl. P. C. 749.
(*f*) 1 Dowl. P. C. 69.

thing recovered, are what the Act refers to; but if the action is in debt, the *debt* recovered is what the Act refers to. If these were real damages, then the case would be out of the statute, but being merely nominal, the defendant is entitled to be discharged. [*Patteson*, J.—The Master says that the practice in taxing the costs is to deduct the shilling given as nominal damages from the amount of costs; the whole therefore of the sum of 7*l.* 3*s.* 10*d.* in fact is resolved into costs.]—That is an additional reason why the defendant in this case should be entitled to the benefit of the Act.

PATTESON, J.—It appears that the words of the Act are, that where persons are in execution on any judgment for any "debt *or* damages, &c.;" "damages" meaning where the sum due arises on an action where damages are the principal thing recovered; and "debt" meaning where the debt is that for which the action is brought. It is clear that the costs are out of the question by the words of the Act. Where the action is in debt, and a large sum is given for interest by way of damages, the inclination of my mind is to think that it would be within the meaning of the words of the Act; but where, as in the present case, only one shilling is given merely as nominal damages, and the practice is to allow that shilling in taxing the costs, I do not think it is within the meaning of the words of the Act. The defendant, therefore, is entitled to be discharged.

Rule for the defendant to be discharged.

CURTIS v. TABRAM.

A rule for judgment as in case of nonsuit may be granted, though eight years have elapsed since the default of the plaintiff.

THIS case, where a rule for judgment as in case of nonsuit was enlarged last term (*a*), came on again for argument. No additional affidavit had been filed on the part of the defendant, of any fresh service of the rule having been effected.

W. H. Watson, on the part of the agent of the plaintiff's attorney, showed cause. After a lapse of nearly eight years, it must be presumed that it was by agreement between the parties that the cause was not proceeded with. At any rate there has been such a delay on the part of the defendant in applying for this rule, that the Court will not now make it absolute.

Austin, contrà.—The words of the statute 14 *Geo.* 2, c. 17, are imperative, that the defendant may *at any time* after default sign judgment as in case of nonsuit. [*Patteson*, J.—The practice has been not to consider it imperative, as the Courts often say, on reasonable grounds being shown, that they will discharge the rule, unless the defendant will agree to a *stet processus.*]—That practice is not contradictory to the interpretation of the statute that is now contended for. There are no cases precisely in point. Those of *Doe* d. *Phillips* v. *Moses* (*b*), *Theobald* v. *Crickmore* (*c*), and *Rucker* v. *Ansley* (*d*), are the only cases which bear on the point. When the rule *nisi* was granted last term by *Littledale*, J., his attention was drawn to the lapse of time since the default of the plaintiff.

(*a*) See the case *ante*, p. 523.
(*b*) 5 Term Rep. 634.
(*c*) 2 Barn. & Ald. 594; 1 Chit. 317.
(*d*) 2 Chit. 243.

Bail Court.

CURTIS v. TABRAM.

PATTESON, J.—The sole question here is, as to the lapse of time. The case having been originally moved before my brother *Littledale*, I shall speak to him.

Cur. adv. vult.

PATTESON, J. afterwards (*Jan.* 19) gave judgment.—I have considered this case, and can find no authority on the point, nor any case where it has been discussed. The cases of *Manby* v. *Worthey* (*e*), and *Doe* d. *Phillips* v. *Moses*, relate to the point of whether a term's notice is requisite. I cannot see how this case, though the motion is made after the lapse of eight years, is distinguishable from any other; the plaintiff therefore must give a peremptory undertaking.

Rule discharged, on a peremptory undertaking being given.

(*e*) 2 W. Black. 1223.

DOE *d.* MITCHELL *v.* ROE.

1. Service of a declaration in ejectment on the mother of the tenant on the premises, is not sufficient even for a rule *nisi* for judgment against the casual ejector.
2. Service on the wife at her husband's house, not being part of the premises, is sufficient.

HODGES, moved for judgment against the casual ejector. The affidavit showed the service of the declaration in ejectment to have been made on the wife of one of the tenants in possession, at the husband's dwelling-house; and upon the mother of the other tenant in possession, at his dwelling-house, which was part of the premises sought to be recovered. [*Patteson*, J.—Does it appear that the dwelling-house where the wife was served is part of the premises?]—It does not. That was held to be unnecessary in the case of *Doe* d. *Lord Southampton* v. *Roe* (*a*).

PATTESON, J.—You may take the motion, so far as it relates to the tenant whose wife was served (*b*), but you cannot have even a rule *nisi* in the other case.

Rule accordingly.

(*a*) 1 Hodges, 24.
(*b*) See also *Doe* d. *Baddam* v. *Roe*, 2 Bos. & Pul. 55; *Doe* d. *Morland* v. *Baylis*, 6 Term Rep. 765; and *Doe* d. *Briggs* v. *Roe*, 1 Dowl. P. C. 312, 2 Crompt. & Jarv. 202.

BROWN *v.* DAUBENEY.

1. A plaintiff may still reply *nil debet* to a set-off, notwithstanding the rules *H.* T. 4 *W.* 4, II. 2, 3.
2. If he replies, never indebted, he cannot give payment in evidence.

DEBT for goods sold and delivered. *Plea:* except as to 2*l.* 10*s.*, that the defendant was never indebted to the plaintiff; and as to the 2*l.* 10*s.* a set-off. *Replication* to the set-off, that the plaintiff never was indebted to the defendant in manner and form as in the plea is alleged; on which issue was joined. At the trial before the Secondary, the defendant's counsel admitted the plaintiff's demand for 2*l.* 10*s.*, and then proved a set-off beyond that amount. The plaintiff's counsel then proposed calling a witness to prove payment of the set-off. This evidence was objected to, as inadmissible to prove the issue on the replication that the plaintiff was never indebted. The Secondary decided that it was inadmissible under that issue. He then summed up the case and left it to the jury, who found a verdict for the defendant. A rule was afterwards obtained, calling upon the defendant to show cause

why the verdict should not be set aside and a nonsuit entered, or a new trial had.

Ball, showed cause.

Mansel, contrà.

Cur. adv. vult.

PATTESON, J. afterwards (*Jan.* 28) gave judgment.—This was a rule calling on the defendant to show cause why a nonsuit should not be entered or a new trial had. It was an action of debt for goods sold. The defendant pleaded, 1st. That he never was indebted, except as to 2*l.* 10*s.*, and as to that sum a set-off. To the set-off the plaintiff replied that he never was indebted; the replication was in that particular form. It appears that at the trial the defendant's counsel admitted the plaintiff's debt of 2*l.* 10*s.*, and then gave evidence on his set-off, and proved more than that amount. The plaintiff then proposed to give evidence of payments in order to reduce that amount. The Secondary refused the evidence, because the issue was on a replication of *never indebted.* The plaintiff's counsel did not distinctly put it to the sheriff that he offered the evidence to reduce the amount of the set-off, but I do not think that is material. Now to show the plaintiff's right to have this evidence admitted, the case of *Shirley* v. *Jacobs* (*a*) was cited. That was a question arising on a plea, and the Court held the evidence admissible, not by way of obtaining a verdict for the defendant, but for the purpose of reducing the damages. Mr. *Mansel* argued, that by analogy with that case, although this was not evidence of payment, yet the plaintiff had a right to have the evidence admitted for the purpose of reducing the amount of the set-off. I thought at first this argument was good, but I think now it is not; because on this replication, if it is once proved that the plaintiff was indebted, the issue must be found for the defendant, just as, had the issue been on a plea, it must have been found for the plaintiff. Now if the issue is found for the defendant there is an end of the action, and there is nothing further to be inquired of for the defendant: but where an issue is found for the *plaintiff*, after the issue is decided, the question arises as to the amount of damages to be recovered; that is to be inquired of, whatever the issue may have been, and that is an inquiry collateral to the finding of the issue. In the present case, the issue being found for the defendant, there is no question as to the amount of the verdict, and the consequence follows, that this evidence is inadmissible. This has arisen entirely from the plaintiff having chosen to adopt this particular form of replication. The new rules only say that no *plea* of *nil debet* shall be allowed (*b*). The plaintiff, therefore, was still at liberty to *reply nil debet* to the plea of set-off, as he might have done before the rules. I must deal with this case as if there had not been those rules, which I think do not apply to replications. The Secondary was therefore right in rejecting the evidence as irrelevant to the issue joined, and on that ground the rule must be discharged. On the question, whether there should be a new trial, I think it would not be worth it for so small a sum, therefore, on that ground also, it is better to discharge the rule.

Rule discharged.

(*a*) 1 Hodges, 214; 2 Bing. N. C. 88; 4 Dowl. P. C. 136.

(*b*) *H.* T. 4 *W.* 4. II. 2, 3; 2 Dowl. P. C. 323.

Bail Court.

BLISS *v.* JOHNSON.

A defendant cannot have leave to enter a suggestion to deprive the plaintiff of his costs, under a Court of Requests Act, which is repealed, though the action was commenced before the Act was repealed.

ON a rule to show cause why a suggestion should not be entered to deprive the plaintiff of his costs, under the *London* Court of Requests Act, 39 & 40 *Geo.* 3, c. civ.

Archbold, showed cause. By the late Act 5 & 6 *W.* 4, c. xciv., the Act on which this rule was moved was repealed from the 30th *September* last. The enactment on which this rule is grounded is not continued in the new Act, and no provision is made for cases now in progress. This rule must therefore be discharged.

Humfrey, contrà.—This action was commenced before the 30th *September*, and, as the object of the statute 39 & 40 *Geo.* 3, c. civ., was to prevent persons suing in the superior Courts, the offence was committed in the commencement of the action, and not by the trial, which was not until after the 30th *September*.

PATTESON, J.—The third section of 5 & 6 *W.* 4, c. xciv., provides carefully how far acts done under the former repealed statutes shall still be valid, and that section does not include this case. The construction generally put on repealing clauses of Acts of Parliament, is, that when they enact that a certain Act shall be repealed from a particular day, then no step can be taken under it after that day. It was held in one case that a commission of bankruptcy issued under the present Bankrupt Act, but grounded on an act of bankruptcy committed before the expiration of the old Bankrupt Acts, could not be supported, those Acts having been repealed (*a*).

Rule discharged.

(*a*) *Maggs* v. *Hunt*, 4 Bing. 212.

The KING *v.* FELLOWS and others.

Certiorari to remove an indictment found at Sessions, on the ground that the defendant was a magistrate, refused to a prosecutor.

AT the last Quarter Sessions for the county of *Norfolk*, an indictment for an assault had been found against the three defendants, one of whom was a magistrate for the county, and the other two were his sons.

W. H. Watson, on the part of the prosecution, moved for a *certiorari* to remove the indictment into this Court. By the late Act 5 & 6 *W.* 4, c. 33, it is necessary to show some ground for removing the indictment into this Court, when the motion is made by the prosecutor. The ground for the present motion is, that the defendant, being a magistrate for the county, could not so well be tried by his brother magistrates at sessions. [*Patteson*, J.—Why did not the prosecutor indict the defendants at the assizes? It was his own act to prosecute them at the sessions.]—That does not appear; it may have been to save time, as the indictment would not then have been tried before the summer assizes. In a case which occurred some years since, connected with the riots at *Clitheroe*, where the military were called in, and a magistrate was indicted at the Sessions for the part he took, *Littledale*, J. granted a similar application.

The KING *v.* FELLOWS.

PATTESON, J.—I do not see the use of the act, if so trifling a cause as the present is to be sufficient. It is not to be supposed that a bench of magistrates will not try the indictment fairly. I shall take time to consider the case.

Cur. adv. vult.

PATTESON, J.—I have mentioned this case to my brother *Littledale*, who has no recollection of the case referred to. I have also mentioned it to the other judges, and they all agree that a *certiorari* cannot be granted on the mere circumstance that one of the defendants is a magistrate. We cannot impute that the Sessions will not try the indictment fairly because it is against a brother magistrate.

Rule refused.

DOWNES *v.* RAY.

A defendant is not entitled to double costs under the *Middlesex* Court of Requests Act, an issue on a plea of tender having been found for him, and a verdict for the plaintiff under 40*s.* beyond the amount tendered.

THIS was an action for 19*l.* 10*s.* for carpenters' work. The defendant pleaded *non assumpsit*, and a tender of 12*l.* To the tender the plaintiff replied a subsequent demand and refusal. At the trial no evidence being given in support of the replication, the jury found a verdict for the defendant on that issue, and for 30*s.* for the plaintiff on the other issue.

C. C. Jones, moved for a rule to show cause why a suggestion should not be entered on the roll to entitle the defendant to double costs, under the *Middlesex* Court of Requests Act, 23 *Geo.* 2, c. 33. The question is, whether the defendant, having pleaded a tender of 12*l.*, is entitled to this rule. The case of *Heaward* v. *Hopkins* (*a*) is apparently a decision against the present application, but here the plaintiff must have known that the defendant would plead a tender. The case of *Jordan* v. *Strong* (*b*) is a decision in favour of the defendant. In *Chadwick* v. *Bunning* (*c*), Lord *Tenterden* refers to the words of the Act 23 *Geo.* 2, c. 33, as peculiar. They are, "if the jury, upon the trial of such cause, shall find a verdict for the plaintiff under 40*s.*" Here, a verdict has been found for the plaintiff under 40*s.*, and the defendant is therefore entitled to the suggestion. The plaintiff ought to have taken the 12*l.* when tendered, and have sued for the remainder in the Court of Requests.

PATTESON, J.—He must still have sued for the whole of his demand, which exceeded 40*s.*, and could not therefore have sued in the inferior Court. None of the cases overrule that of *Heaward* v. *Hopkins*, which seems to me to be good law.

Rule refused.

(*a*) Dougl. 431.
(*b*) 5 Maule & Selw. 196.
(*c*) 5 Barn. & Cress. 532.

Bail Court.

The KING *v.* HESTER.

The defendant cannot have a *certiorari* to remove a conviction for being found in pursuit of game, under 1 & 2 *W.* 4, c. 32.

THE defendant had been convicted under 1 & 2 *Will.* 4, c. 32, s. 30, for being found in pursuit of game. He appealed to the Quarter Sessions, where the conviction was confirmed.

Butt, moved for a *certiorari* to remove the conviction into this Court.—It might appear by 1 & 2 *Will.* 4, c. 32, s. 45, that the defendant is not entitled to have a *certiorari*, as that section enacts that no conviction under that Act shall be removed by *certiorari*. This conviction, however, was not in fact a conviction under that Act. Section 37 provides, that the penalties shall be paid to the overseers of the poor; but, by a subsequent Act, 5 & 6 *Will.* 4, c. 20, s. 21, it is provided, that a moiety of the penalty should go to the informer. That Act came into operation on the 30th of *July* last, and this was a conviction for an offence committed since. This therefore is a conviction under the last Act, which contains no clause taking away the *certiorari*. The defendant therefore contends, that the clause in the 1 & 2 *Will.* 4, taking away the *certiorari*, does not apply. A case of *The King* v. *Boultbee* was argued a few days since in the full Court, and a *certiorari* was granted. [*Patteson*, J.—There the conviction was *quashed* by the Sessions, and the question was, whether the Crown was included, not being specially named in the clause taking away the *certiorari*. It was held that it was not, and a rule to quash the *certiorari* was granted.]—Still a *certiorari* may be granted, this being in fact a conviction under 5 & 6 *Will.* 4, c. 20, s. 21.

PATTESON, J.—I think it is impossible to say that this is a conviction on the last Act. The offence is created by the first, and the last only regulates the payment of the penalty. It still therefore remains a conviction under the first, and the clause taking away the *certiorari* cannot be got rid of.

Rule refused.

HARRISON *v.* FORSTER.

The Court will not restrain a Sheriff from selling goods seized under a *fi. fa.* at the instance of a person who claims the goods as his property.

A *Fieri facias* issued on a judgment against the defendant, under which the Sheriff took possession of some goods. Notice was given to the Sheriff that the goods did not belong to the defendant but to *Kerr*, who required the Sheriff not to sell, and offered him an indemnity. The Sheriff refused the indemnity, and said he should proceed to the sale.

Hurlstone applied, on the part of *Kerr*, for a rule to restrain the Sheriff from selling. He did not know of any authority for the application, but stated it was of consequence that the goods should not be sold, as there was amongst the property sold a Bible containing a pedigree, besides other things which were of value to the owner, though of little intrinsic value themselves.

PATTESON, J.—The Sheriff seizes the goods, refuses the indemnity offered him, and proceeds to a sale. He does that at his own peril, and I cannot give any assistance to the claimant.

Rule refused.

DRINKER *v.* PASCOE.

1. The practice that where a rule is moved with costs, and is discharged generally, the costs are given, applies to rules for irregularity only.
2. A rule having been discharged without any mention of costs, though it was the intention of the Court to give the costs, and the rule having afterwards been drawn up in form as discharged with costs, the Court, the following term, refused to alter it.

THIS was an action for an assault brought by a maid-servant against her master. A rule had been obtained last term calling on the plaintiff's attorney to show cause why the action should not be discontinued, on account of the plaintiff having instructed her attorney not to go on with it, and why he should not pay the costs of the rule. On showing cause in full Court the last day of last term, the Court discharged the rule. *Platt* then asked for the costs, and indorsed his brief as if the costs were given, understanding the Court to intimate that the rule was to be discharged, and nothing said about the costs, and that therefore the costs were given as a matter of course. It appeared that *Martin*, who was in support of the rule, did not hear the observation of the Court. The rule was afterwards drawn up in form as discharged *with costs*.

Martin, this term obtained a rule to show cause why that rule should not be amended, by striking out the words "with costs."

Platt and *Heaton*, showed cause in the first instance.—The rule in all cases is, that where a rule is moved with costs, and is discharged generally, nothing being said about costs, that, as it is moved with costs, it is discharged with costs. That rule is not confined to cases of irregularity only. Though the rule of *M.* T. 37 *Geo.* 3 (*a*), in terms applies to cases of irregularity only, still the practice of the Court has been to do the same in all cases. Even if the practice extends to cases of irregularity only, still this rule was rightly drawn up, for this was a case of irregularity. The ground for discontinuing the action was, because the plaintiff had forbidden her attorney to proceed with it. That was strictly an irregularity. It is moreover clear, from what the Court intimated on discharging the rule, that the intention of the Court was to grant the costs of the application. This rule must therefore be discharged.

Martin, contrà.—The question here is merely, whether the other side is entitled to the costs of the rule discharged last term. The practice, as laid down both in *Tidd*'s and *Archbold*'s Practice, is distinct, that it is in cases of irregularity only that a rule discharged without any mention of costs gives the costs to the party opposing it. The rule of *M.* T. 37 *Geo.* 3, evidently applies to cases of irregularity only. The necessity of that rule proves that the practice in other cases must be different. It cannot be contended that in this case there was an irregularity. The rule was moved on account of the plaintiff's attorney proceeding with the cause contrary to his instructions. It is clear that it was discharged last term without costs, and therefore the rule

(*a*) 7 Term Rep. 82.

Bail Court.

DRINKER v. PASCOE.

which has been drawn up discharging it with costs, contrary to the order of the Court, must now be amended.

PATTESON, J.—I will speak to the Chief Justice as to what passed in the Court last term. It is right that it should be settled whether the rule of *M.* T. 37 *Geo.* 3, which in terms applies to cases of irregularity only, applies to all cases where a rule is moved with costs, as there ought to be no doubt on the subject. I shall take time to consider that question. Next, as to the irregularity, my impression is strong that it was not an irregularity, but misconduct on the part of the attorney; but I shall take time to consider that also. Then, as to the rule having been in fact discharged without costs, I have a difficulty, as it is a question whether I have any right to disturb the order of the Court.

Cur. adv. vult.

PATTESON, J. afterwards (*January* 7) gave judgment.—I have spoken to the Chief Justice, and, as I expected, he has no recollection of this case. I have also mentioned it to the other judges, and we have no doubt but that what Mr. *Platt* indorsed on his brief was correct. It perhaps shows no more than this:—that the Court would have considered the question of costs, unless it had been for the supposed practice extending to all cases. I have looked into the practice, and it is desirable that it should be settled what that practice is. It is clear that the rule of *M.* T. 37 *Geo.* 3, which in terms applies to cases of irregularity only, has not been extended to other cases by any other subsequent rule. Therefore, the argument that that rule extends to all cases where a rule is moved with costs, is clearly wrong, as it is confined to cases of irregularity only. I do not mean to say, if a rule were moved on a matter of irregularity, but did not contain the words "for irregularity," that the Court would be strict, and would not follow the rule that if discharged generally it was discharged with costs. It is fit that such a case should be discussed if it should arise hereafter. But I am sure that all cases except rules for irregularity are discharged without costs, unless costs are particularly mentioned. Next, it was contended that this was an irregularity. I said before, that I thought it was not to be so considered. It was on account of the attorney continuing to carry on the action after he had received an order from the plaintiff not to do so. That was not an irregularity, and therefore in that respect the argument fails. The third point contended for was, that the Court did really intend to discharge the rule with costs. I have a difficulty in saying that if the Court were to say nothing about costs, and a rule were drawn up without any mention of costs, whether it would be competent for the Court to enter again into the matter in a subsequent term, even if the Court intended to discharge the rule with costs; but if the Court inadvertently omitted to say any thing about costs, I think the party would have a right to apply to the Court. Here the costs are given by the rule as drawn up, and the question is, if I am to disturb it. If the Court did not intend to discharge the rule with costs, perhaps I might interfere; but as it appears the Court would have given the costs, and as indeed I think I also should give them were the matter *res integra*, I shall not disturb the rule.

Rule discharged.

DENNEHAYE *v.* RICHARDSON.

After several defaults in trying a cause, the Court will enlarge a peremptory undertaking, on the terms of the plaintiff paying the costs of the day.

NOTICE of trial was given in this cause for the third sittings in *Easter* Term last. The plaintiff did not proceed to trial, and in *Trinity* Term the defendant moved for judgment as in case of nonsuit. The rule *nisi* was discharged on a peremptory undertaking to try at the Sittings after the term. The plaintiff again made default, and in *Michaelmas* Term had the peremptory undertaking enlarged to try at the Sittings after that term. The cause was set down in the paper for the 28th of *November*. On the 25th and 26th the plaintiff delivered his briefs to counsel, and on the evening of the 27th a consultation was appointed. Counsel then suggested that certain proceedings in bankruptcy should be given in evidence. The next morning, before this evidence could be procured, the cause had been called on, and the evidence not being ready, the record was withdrawn. A rule was this term obtained to show cause why the peremptory undertaking should not be again enlarged.

Humfrey, showed cause, and contended, that if the peremptory undertaking was enlarged at all, it should only be on the terms of the payment of the costs of the day. He referred to a case decided this term in the Court of *Exchequer*.

Thesiger, contrà.

PATTESON, J.—It seems to me that it would be contrary to the rule of Court (*a*) to impose those terms on the plaintiff, but I will inquire as to the practice.

Cur. adv. vult.

PATTESON, J. afterwards, the same day.—I have applied to the Court of *Exchequer*, and hear that they do in some cases make it a condition, on enlarging a peremptory undertaking, that the plaintiff should pay the costs of the day.

Rule absolute on those terms.

(*a*) *Reg. Gen. H.* T. 2 *Will.* 4, 69; 1 Dowl. P. C. 192.

OSTLER *v.* BOWER.

The Court discharged a rule obtained by the Sheriff under the Interpleader Act, it appearing that a son of the plaintiff, who was in partnership with his father as an attorney, was the under-sheriff.

THIS was a rule obtained on the part of the Sheriff under the Interpleader Act, 1 & 2 *W.* 4, c. 58, s. 6. On the affidavits it appeared that the plaintiff was an attorney, and was also under-sheriff of the county. It was objected, under these circumstances, that as the under-sheriff gave a bond of indemnity to the Sheriff, the application was made on the part of the under-sheriff himself, who was the plaintiff in the cause, and that therefore the rule must be discharged.

J. Hildyard, for the Sheriff; *N. Clarke*, for the execution creditor; *Wightman*, for one claimant; *Butt*, for another.

Bail Court.

OSTLER v. BOWER.

PATTESON, J.—I do not know that this point has ever arisen. Where the plaintiff himself is under-sheriff, how can he deny collusion? It seems to me the Sheriff has no right to apply, he having a bond of indemnity from the under-sheriff.

Cur. adv. vult.

PATTESON, J. on a subsequent day (*January* 22.)—This is an application under the Sheriff's clause in the Interpleader Act. I have considered all the circumstances, and think the rule ought to be discharged. I think it sufficient to say, that unless there are particular circumstances, where the under-sheriff is the plaintiff in an action, that the Act does not apply. The Act was intended to secure the Sheriff, but the under-sheriff gives a bond to indemnify the Sheriff, and therefore he runs no risk. Therefore, on the general principle, where the under-sheriff is plaintiff, the Act does not apply, and no rule ought to have been granted.

It was then suggested, that the real facts of the case were, that a son of the plaintiff, and who was in partnership with the plaintiff, was the under-sheriff. The father and son having the same christian as well as sirnames, and the father having sued without naming himself "the elder," had probably been the cause of a mistake in swearing the affidavits that the plaintiff himself was under-sheriff. Those facts having been ascertained and admitted,

PATTESON, J. on a subsequent day (*January* 28) said,—The case of *Dudden* v. *Long* (*a*) is not so strong a case as the present. In this case the under-sheriff is not only the partner of a person connected with the proceedings, but is the partner of the plaintiff in the action, and is moreover his son. On reference to that case, I cannot do otherwise than discharge this rule.

Rule discharged, without costs.

(*a*) 1 Bing. N. C. 299; 3 Dowl. P. C. 139.

JERVIS *v.* JONES.

1. An affidavit describing the deponent as "the defendant in the cause," and as "now in the custody of the Sheriff of *Middlesex*," sufficiently complies with the rules *M.* T. 15 *C.* 2, and *H.* T. 2 *W.* 4, I. s. 5.

2. An application to discharge a defendant out of custody, made five days after the arrest, is sufficiently early.

3. An insolvent having inserted in his schedule the consideration given for, and the amount of an annuity, but not some arrears due at the time of filing the schedule:—*Held*, that he could not afterwards be arrested for those arrears, there being no intention to mislead.

THE defendant in this cause had been arrested, on the 16th of *January* last, for the sum of 475*l.*, being four years and three quarters arrears of an annuity up to the 1st of *February*, 1832. A rule had been obtained on the 21st of *January* to show cause why he should not be discharged out of the custody of the Sheriff of *Middlesex*, as he had been discharged under the Insolvent Debtors' Act, 7 *Geo.* 4, c. 57. The defendant filed his petition to the Insolvent Court on the 1st of *February*, 1832, and on the 9th delivered in his schedule, in which was inserted, amongst his other debts, the following as due to the present plaintiff:—"Major *William Davies Jervis*,—1000*l.*

—1827;" and the nature and consideration of the debt was stated to be "My having granted an annuity to this creditor of 100*l.* per annum, for the advance of 1000*l.* in 1827." The defendant was discharged by the Insolvent Court on the 9th of *April*, 1832. He had been now arrested for the arrears of the same annuity due up to the time of filing his petition.

Wordsworth showed cause.—A preliminary objection to this rule is, that the defendant's affidavit, on which the rule was grounded, does not contain the defendant's addition and place of abode, according to the rule *M.* T. 15 *Car.* 2. He is only called "the above-named defendant." This point was decided in *Lawson* v. *Case* (*a*). [*Patteson*, J.—The question is, whether that rule applies to the parties in a cause.]—In *Collins* v. *Goodyear* (*b*), it was held to be applicable to a plaintiff. *Jarrett* v. *Dillon* (*c*) is an authority to the same effect. The new Rule of Court, *H.* T. 2 *Will.* 4, I. s. 5 (*d*), also requires that the addition of every person making an affidavit should be inserted. [*Patteson*, J.—That rule does not alter the law as regards *this* Court. It only extends the rule which previously prevailed to the other Courts.]—Another preliminary objection is, that this rule was moved for too late. *Hinton* v. *Stevens* (*e*) is an authority to show that the application should be made within four days. The defendant was arrested on the 16th of *January*, and the rule was moved for on the 21st, which is five days.

Hoggins, *contrà*.—The affidavit names the deponent as the defendant in the cause, and also states that he has been taken in custody, and that he "is now in the custody of the Sheriff of *Middlesex*." The case of *Sharpe* v. *Johnston* (*f*) shows that the rule of *H.* T. 2 *Will.* 4, does not extend to defendants in custody. *Jackson* v. *Chard* (*g*) also shows that rule not to apply to the defendant in a cause. *Poole* v. *Pembrey* (*h*) is to the same effect. [*Patteson*, J.—There seems to be a decision of the Court of *Exchequer* one way and then one the contrary, and then one of this Court supporting the first decision in the *Exchequer*.]—This rule was also obtained in time. Applications to set aside proceedings on account of irregularity, must be made within four days, but that practice does not extend to motions for discharging a defendant out of custody.

PATTESON, J.—It seems to me that this affidavit is sufficient. It describes the deponent as the "defendant in the cause," and as "now in the custody of the Sheriff of *Middlesex*." In effect that is a compliance with the rule, as the affidavit has given a sufficient description of the deponent to let the parties know who he is. The case of *Sharpe* v. *Johnston* is also an authority to show the affidavit in this case is sufficient. As to the point of whether the *defendant* in a cause must state his addition, I have some doubt, as there are conflicting decisions. I think also this application was made in time, and that five days is not too long where a party is in custody, though four days may be a good rule on questions of irregularity (*i*).

(*a*) 2 Dowl. P. C. 40; 1 Cromp. & Mees. 481.
(*b*) 2 Barn. & Cress. 563.
(*c*) 1 East, 18.
(*d*) 1 Dowl. P. C. 184.
(*e*) *Ante*, 521; 4 Dowl. P. C. 283.
(*f*) 1 Hodges, 298; 2 Bing. N. C. 246; 4 Dowl. P. C. 324.
(*g*) 2 Dowl. P. C. 469.
(*h*) 1 Dowl. P. C. 693.
(*i*) See *Primrose* v. *Baddeley*, 2 Dowl. P. C. 350.

Bail Court.

JERVIS v. JONES.

Wordsworth then showed cause on the merits.—The defendant cannot be discharged, as those arrears of the annuity were not inserted in the schedule. The schedule only mentions the sum of 1000*l.*, which was the consideration given for the annuity. The arrears then due are not mentioned. The 46th section of the Insolvent Act, 7 *Geo.* 4, c. 57, only operates to discharge the defendant of debts mentioned in the schedule. The 51st section applies to payments of annuities becoming due *subsequently* to the filing of the petition alone. These arrears therefore are not within that section. The 40th section requires the schedule to contain a full and true description of all debts due at the time of filing it. That section has not been complied with, and the defendant is not entitled to be discharged.

Hoggins, contrà.—The 51st section is sufficiently comprehensive to have enabled the plaintiff to prove for the arrears, as well as for the future payments in one sum. The description given of this debt in the schedule was quite sufficient. The language of the 46th section is, that the prisoner may be discharged "as to the several debts and sums of money due or claimed to be due, at the time of filing such prisoner's petition, from such prisoner to *the several persons named in his schedule as creditors.*" Now this plaintiff was a person named in the schedule as a creditor. Had the Act said "all debts named in the schedule," the defendant might not perhaps have been entitled to his discharge. [*Patteson*, J.—Are you aware of any case where there have been two debts due to the same person, and only one has been inserted in the schedule? *Forman* v. *Drew* (*a*) is the nearest case I know of, but in that case there was only a difference of 2*s.* 6*d.* in the amount of the debt. Here in effect there were two debts; first, the arrears then due; secondly, the future payments, but which were only then a debt by virtue of the 51st section of the Act.]—The only cases are those of *Collins* v. *Lightfoot* (*b*) and *Guy* v. *Newson* (*c*), but those are cases as to subsequent payments of money.

PATTESON, J.—On looking at the 40th and 46th sections of the Act, which are the material clauses, it appears that by the 40th it is enacted that the schedule shall contain "a full and true description of all debts due or growing due from such prisoner at the time of filing such petition;" and then by the 46th it is enacted, that the prisoner shall be discharged "as to the several debts and sums of money due or claimed to be due, at the time of filing such prisoner's petition, from such prisoner to the several persons named in his or her schedule as creditors." It seems therefore that these clauses are differently worded from the previous Insolvent Acts, for, on reference to the statute 1 *Geo.* 4, c. 119, it appears that that Act directed that the Insolvent Court should specify the debts to which the discharge should apply. In the statute 7 *Geo.* 4, c. 57, it is different, as the discharge extends to all debts due to *persons named in the schedule.* Now, according to those words, these arrears of the annuity are included, for the plaintiff was a person named in the schedule. I doubt if a person had two distinct debts owing by an insolvent, one of which alone was inserted in the

(*a*) 4 Barn. & Cress. 15; 6 Dowl. & Ryl. 75.

(*b*) 5 Barn. & Cress. 581; 8 Dowl. & Ryl. 339.

(*c*) 4 Tyr. 31; 3 Cromp. & Mees. 140.

schedule, whether he would not be considered as two distinct persons, and whether, one being omitted, it would not be considered, *quoad* that one, that the person was not named. If these were two distinct debts, there might be something in that argument; but here the arrears are due in respect of the same transaction; and although it is true that only the sum which was the consideration for the annuity was inserted in the schedule, and therefore what he considered the annuity worth under the 51st section of the Act, yet the creditor must have had his attention drawn to the arrears of the annuity then due. There is nothing in the Act of Parliament to have prevented him proving all his debt; and therefore, as he was not misled, nor was there any intention to mislead him, I think the defendant is entitled to his discharge. In the case of *Foreman* v. *Drew* the Court acted on that principle. There were two objections made in that case; namely, that neither the right sum nor the right person were named in the schedule. Lord *Tenterden* there said, "Now as to the amount, there is a difference of 2*s.* 6*d.* only between the debt due to the plaintiffs and that described in the schedule. That difference is so small that it could not have been intended, nor could it indeed have the effect of misleading the creditor. If the sum mentioned in the schedule varied materially from that due to the plaintiffs, that might be evidence of an intention to mislead the plaintiffs; but that not being so, the debt was sufficiently described as to amount." That principle is applicable to the present case. The 1000*l.* given for the annuity is mentioned in the schedule, but the arrears were not; and as the creditor clearly was not misled, and there was no intention to mislead him, the defendant is therefore entitled to his discharge. The rule will be made absolute, but without costs, as it has arisen from the defendant's own negligence in drawing up his schedule in this manner.

Rule absolute without costs.

CROAD *v.* HARRIS.

An old Court of Requests Act gave defendants a particular remedy for costs, where *upon the trial* the amount due was found to be under 40*s.*:—*Held*, this extended to trials before the Sheriff under the late stat. 3 & 4 *W.* 4, c. 42, ss. 17, 18.

THIS was an action for work and labour; the defendant pleaded that he never was indebted except as to ten shillings; that the plaintiff agreed to do the work for 6*l.*; that 5*l.* 10*s.* had been paid; and, as to the 10*s.*, payment into Court. On these pleas issue was joined. A summons was then obtained to show cause, before a judge at chambers, why the issue should not be tried before the Sheriff of *Gloucestershire*, the amount in dispute being under 20*l.* It was objected before *Williams*, J., that the cause of action arose, and the defendant resided, within the city of *Gloucester*, and was within the jurisdiction of a Court of Requests established by an Act of 1 *W.* & *M.*; and that if the action was tried before the Sheriff, and less than 40*s.* recovered, it was doubtful whether the defendant could have the benefit of that Act (*a*). *Williams*, J. accordingly refused to order the cause

(*a*) By that Act it is enacted,—"And if any person or persons shall at any time next after the 1st day of *August*, 1689, commence and prosecute any action in any of his Majesty's Courts at *Westminster*, or in any other Court, against any person inhabiting or residing within the city and county of the city of *Bristol*, and the city and county of the city of *Gloucester*, and places afore-mentioned, for any debt or sum of money due upon contract, promise, specialty or otherwise, which upon the trial shall be found not to amount to the full sum or value of forty shillings, over and above costs, no judgment shall be entered upon record of any such verdict, and if judgment shall be entered thereon, then

Bail Court.

CROAD v. HARRIS.

to be tried before the Sheriff. A rule was then obtained for the same purpose; against which

R. V. Richards showed cause.—The question here is, whether the Court will send this case to be tried before the Sheriff, when it is not clear that the defendant, after such a trial, will have the benefit of the Court of Requests' Act as to his costs. The Court will not do so if there are good grounds of doubt on the subject. The words "which upon *the trial* shall be found not to amount to, &c.," in the statute, must mean *trials* as they were conducted according to the practice at the time of the passing of that Act. They cannot mean trials before the Sheriff under the late Act.

Whitmore, contrà.—There can be no doubt as to the construction to be put on this Act. This cause is still in the superior Court, though tried before the Sheriff under the statute 3 & 4 *Will.* 4, c. 42, s. 17, 18. That Act only excepts cases where points of difficulty may arise on the trial. This point cannot arise on the trial. The case of *Bond* v. *Bailey* (*a*), though decided before, has been published since this case was before *Williams*, J. That case decides the present. *Oates* v. *Shaw*, decided this term in the Court of *Exchequer*, is also an authority in favour of this rule.

PATTESON, J.—This question turns entirely on the meaning of the word "trial" in the statute 1 *W. & M.*, and whether it extends to a trial before the Sheriff. The late Act 3 & 4 *Will.* 4, c. 42, ss. 17, 18, giving the trial before the sheriff, contains no restrictive words. Now on that Act the Courts have already put a construction, that a default in proceeding to trial before the Sheriff, is a default within the statute 14 *Geo.* 2, c. 17, and will entitle the defendant to move for judgment as in case of nonsuit (*b*). It was contended, that to entitle a defendant to judgment as in case of nonsuit, there must be a default in not proceeding to trial according to the course and practice of trials at the time of the passing of 14 *Geo.* 2, c. 17; but the Court thought otherwise, and that a default in not trying before the Sheriff was a neglect within that statute. So here the word "trial" in this statute, will, I have no doubt, extend to a trial before the Sheriff. I think I might have had some doubt on the subject, as the case has been already before my brother *Williams*, who was of a different opinion; but the cases referred to, which were not then cited, decide the question.

Rule absolute.

such judgment shall, and is hereby declared null and void; and also the defendant, in every such action, shall have his costs in the said suit, to be taxed by the said Court, or their proper officers, where such action shall be tried and paid him by such plaintiff in the said cause; any law or custom to the contrary in anywise notwithstanding."

(*a*) 1 Gale, 162; 2 Crom., M. & Rosc. 246.

(*b*) *Maddeley* v. *Batty*, 3 Dowl. P. C. 205.

GRAY *v.* WITHERS.

Judgment allowed to be signed on a warrant of attorney, where letters had been recently received from the defendant from a distance, the hand-writing of which was sworn to.

STEER, on the 28th of *January*, moved to enter up judgment on an old warrant of attorney. The affidavit on which he moved, stated that the deponent believed the defendant to be living at an hotel at *Cheltenham;* that three letters had been received from him thence, dated on the 20th, 22d, and 26th of *January*, in answer to letters addressed by the deponent to him. The deponent also swore to the hand-writing. He submitted that was sufficient proof of the defendant being alive.

PATTESON, J.—The hand-writing being sworn to, the party is identified. You may take your rule.

Rule granted.

BIRKET *v.* HOLME.

There must be personal service of the rule *nisi* for an attachment, though there has been personal service of the rule, for disobedience to which the rule *nisi* for the attachment issued.

A Rule of Court was personally served on the defendant for disobedience, to which a rule *nisi* for an attachment issued. Several attempts were made to serve the rule *nisi* for the attachment personally, but it appeared that the defendant kept out of the way to avoid the service. On an affidavit of those facts,

Martin moved to make the rule for the attachment absolute.—*Levy* v. *Duncombe* (*a*) is an authority to show, that although it is necessary there should be personal service of the rule, for disobedience to which the party is in contempt, yet there need not be personal service of the rule *nisi* for the attachment. This therefore is only the ordinary case of the service of a rule, and, under the circumstances, there need not be personal service.

PATTESON, J.—In the case cited, it was decided, that the party by appearing waived any irregularity there might have been in the service. This rule cannot be made absolute, but may be enlarged (*b*).

Rule enlarged.

(*a*) 1 Gale, 60; 3 Dowl. P. C. 447; 1 Crom., M. & Rosc. 737.

(*b*) See *Albin* v. *Toomer, ante*, p. 215.

BALSON *v.* MEGGAT.

A mere request by a plaintiff to a Sheriff to issue his warrant on a *fi. fa.* to a particular individual amongst his officers, does not make him a special bailiff so as to make him the plaintiff's agent.

THIS was a rule to show cause why a rule to the Sheriff to return a *fieri facias* should not be discharged. The cause was tried in *December*, 1834, and in *January*, 1835, a *fieri facias* issued to levy the debt and costs. In *July* following, the sheriff's officer made a levy on the goods of the defendant, and an agreement having been made between the officer and the defendant to give the latter time to raise the money, the goods were not sold until *November* last. Between the time of the levy and of the sale, a half-year's rent had become due to the landlord, and he made a claim for it on the proceeds of the sale, which were in the Sheriff's hands. The Sheriff

Bail Court.

BALSON v. MEGGAT.

in consequence refused to pay over the proceeds to the plaintiff. It was uncertain, from the affidavits, whether the agreement between the sheriff's officer and the defendant to give him time, was made with the consent of the plaintiff or not. On the *fieri facias* issuing, the plaintiff requested the Sheriff to issue his warrant thereon to a particular person, who was one of the Sheriff's usual officers, and the warrant was issued to that officer.

Shaw showed cause, and contended on the affidavits, that the plaintiff was not a party to the agreement to give the defendant time, and that the Sheriff could not retain the money for the rent that had become due after the levy (*a*).

J. Hildyard, contrà, contended that a special bailiff having been appointed at the request of the plaintiff, he was bound by the acts of the officer, and that it relieved the Sheriff from his responsibility. He also contended, that the affidavits showed the plaintiff was party to the agreement, and that the Sheriff was bound to pay the landlord the half-year's rent.

COLERIDGE, J.—The first point made in this case is, that a special bailiff was appointed at the request of the plaintiff, and that therefore the Sheriff is not responsible. I think the mere request of the plaintiff to deliver the warrant to one particular individual amongst his officers, which request the Sheriff was not bound to comply with, does not make him a special bailiff, or relieve the Sheriff of his responsibility (*b*). As to the compromise being with the consent of the plaintiff, it is not distinctly made out on the affidavits. If the landlord has a right to the half-year's rent, the Sheriff may pay it if he pleases, and can make a return accordingly, when the question will properly come before the Court, which it does not at present.

Rule discharged.

(*a*) See *Hoskins* v. *Knight*, 1 Maule & Sel. 245; and *Gwilliam* v. *Barker*, 1 Price, 274.

(*b*) See *Porter* v. *Viner*, 1 Chit. 613, n.; and *Pallister* v. *Pallister*, 1 Chit. 614, n.

Ex parte PHILLIPS.

The Court will not grant a *mandamus* to admit an heir to a copyhold, where it appears his claim is long since barred by the Statute of Limitations.

THIS was a rule to show cause why a *mandamus* should not issue to the lord of a manor, to admit *John Phillips* to a copyhold, as heir at law. He claimed as heir at law to *James Phillips*, who died in 1795. It appeared that after his death no person claimed as his heir until the year 1809, when *John Osborn* claimed as his heir at law, and in 1811 was admitted. *John Osborn* died in 1816 or 1817, and no person had been admitted since his death, his heir having been transported for some crime. The affidavits were contradictory as to the right of *J. Osborn* to be admitted as heir to *James Phillips*.

The Hon. *J. C. Talbot* showed cause.—This rule must be discharged, because the remedy sought by it, is unnecessary for the applicant to establish

his title. In the case of *The King* v. *Bennett* (*a*) a similar application was refused. That case is said to be overruled by the case of *The King* v. *The Brewers' Company* (*b*), but on reference it appears that it does not in fact overrule it. It is a mere dictum in that case, that the heir of a copyholder is entitled to this motion. In the case of *Right* d. *Taylor* v. *Bankes* (*c*), it was held, that the heir at law of a copyholder might devise the copyhold without having been admitted. *Doe* d. *Burrell* v. *Bellamy* (*d*), and *Doe* d. *Tofield* v. *Tofield* (*e*), are authorities to show that the heir of a copyholder may maintain ejectment without admittance. This remedy therefore by *mandamus* is unnecessary. The cases where *The King* v. *The Brewers' Company* is held to overrule that of *The King* v. *Bennet*, cannot be cited to show that the mere claim of a person as heir will entitle him to a *mandamus*. *The King* v. *The Lord of the Manor of Bonsal* (*f*), and *Widdowson* v. *Harrington, Earl of* (*g*), cited in *Watkins* on Copyholds, show there must be a *clear* claim. The lord's right to fines was involved in the question decided in the case of *The King* v. *Wilson* (*h*), which therefore does not apply. In this case the applicant has not only a doubtful but a decidedly bad title. He has made no claim since the year 1795, and therefore is barred by the statute 3 & 4 *Will.* 4, c. 27. The Court will not grant a *mandamus* to admit a person as heir who is so clearly not entitled to recover possession.

R. V. Richards, contrà.—The case of *The King* v. *Bennet* was overruled in *The King* v. *The Brewers' Company*. In *The King* v. *The Lord of the Manor of Bonsal*, Lord *Tenterden* says it was so overruled. [*Coleridge*, J.—My only doubt is as to the point of the time that has elapsed.]—The Court will not conclude the lord by what is stated now on the affidavits. The real facts of the case may be very different. [*Coleridge*, J.—It is not to be understood that *The King* v. *The Brewers' Company* altered the law as to the heir being entitled to bring ejectment without admittance. A *mandamus* may be had to admit him for other purposes.]—The applicant in this case may have been beyond seas, or under some disability, so that he may not be barred by the statute of his right to recover. His object is to have a *mandamus*, so as to try his right in an action for a false return. The lord is at this time holding for himself, there being no tenant on the Court-rolls.

COLERIDGE, J.—It is not necessary for me to make this rule absolute, in order to enable the applicant to try his title. It seems to me that the applicant is wholly out of time, but I do not prejudice him in bringing an ejectment by refusing this application.

Rule discharged.

(*a*) 2 Term Rep. 177.
(*b*) 4 Dowl. & Ryl. 492; 3 Barn. & Cress. 172.
(*c*) 3 Barn. & Adol. 664.
(*d*) 2 Maule & Sel. 87.
(*e*) 11 East, 246.
(*f*) 4 Dowl. & Ryl. 825; 2 Barn. & Cress. 173.
(*g*) 1 Jac. & Walk. 532.
(*h*) 10 Barn. & Cress. 80.

Bail Court.

DOUGLAS *v.* WINN.

Issue having been joined in *Trinity* term in a country cause, and no notice of trial given for the next assizes, the defendant cannot move for judgment as in case of nonsuit until after the following Spring Assizes.

IN *Trinity* Term last issue was joined in this cause. The venue was in *Lancashire*, and no notice of trial had been given for the last assizes, nor since. A rule for judgment as in case of nonsuit having been obtained this term,

Wightman showed cause.—The plaintiff was not bound to give notice of trial until the term following that in which issue was joined. Mr. *Tidd* lays down that to be the rule (*a*), and cites *Hall* v. *Buchanan* (*b*). This being a country cause, this rule is premature, and cannot be moved for until after the next assizes, as that is the earliest opportunity the plaintiff has for proceeding to trial.

Addison, contrà.—Mr. *Tidd*, in a note to the passage referred to, expresses a doubt whether this rule may not be moved for the next term after the first assizes, though notice of trial has not been given. The plaintiff might have proceeded to trial at the last assizes, and at any rate ought to have given notice of trial in *Michaelmas* term for the next assizes, and having done neither, the defendant is entitled to this rule.

COLERIDGE, J.—This rule cannot be moved for until after the next assizes, it must now, therefore, undoubtedly be discharged.

Rule discharged.

(*a*) Page 764, 9th ed.

(*b*) 2 Term Rep. 734.

SHUTTLEWORTH *v.* CLARK.

A claimant to some goods seized by a Sheriff, not having appeared on a rule under the Interpleader Act, a rule for him to pay the plaintiff's costs is not absolute in the first instance.

CLARKE, on a former day, had obtained a rule for the Sheriff of *Derbyshire*, under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, s. 6.

Addison now appeared for the execution creditor.—The claimant does not now appear, and therefore the execution creditor is entitled to his costs against the claimant; *Bowdler* v. *Smith* (*c*), *Perkins* v. *Burton* (*d*), *Philby* v. *Ikey* (*e*), and *Lewis* v. *Eicke* (*f*). This rule for costs against the claimant may moreover be absolute in the first instance. [*Coleridge*, J.—In *Perkins* v. *Burton*, the rule drawn up was *to show cause* why the claimant should not pay the execution creditor his costs. In *Philby* v. *Ikey* also the rule was in the same way.]—The practice is not bound by those decisions. In the last of those cases it was the *Sheriff* who applied for costs, which distinguishes the case. In *Bowdler* v. *Smith* the rule appears to have been absolute in the first instance.

(*c*) 1 Dowl. P. C. 417.
(*d*) 2 Dowl. P. C. 108.
(*e*) 2 Dowl. P. C. 222.
(*f*) 2 Dowl. P. C. 337.

COLERIDGE, J.—This is an application under the third section of the Interpleader Act. Two or three cases have been cited in support of it, and it is singular that the exact terms of the section of the Act are not referred to in those cases. Now the words of that section are, that the Court is "to make such order between such *defendant* and the *plaintiff*, as to costs and other matters, as may seem just and reasonable;" so that, as to the exact words of the Act, they are confined to giving costs between the plaintiff and the defendant. Nevertheless, I think I am bound by the cases that have been decided, as to the authority of the Court to give costs against the *claimant*. I do not, however, think the Court would make the order without hearing the party. The rule, therefore, must be drawn up, that the claimant must pay the plaintiff's costs, unless he shows cause within ten days.

Rule *nisi* accordingly.

PENSON'S Bail.

CHILTON opposed this bail, and objected that the affidavit of justification did not comply with the rule of *T.* T. 1 *Will.* 4, s. 3 (*a*), as it omitted to state the nature of the property of one of the bail.

A defendant having given notice of bail according to the rule of *T.* T. 1 *W.* 4, is bound to adopt the form of affidavit of justification given in that rule.

Whateley, contrà.—This affidavit is sufficient according to the form used previous to the rule of *T.* T. 1 *Will.* 4. The defendant is not bound to adopt the form there given. That rule only says, if the notice of bail is accompanied by an affidavit in the form there given, and the bail are excepted to and allowed, that the plaintiff shall pay the costs of justification. That rule is only directory, according to a reported case (*b*). This is a case of country bail, and notice of bail was given according to the rules of *T.* T. 1 *Will.* 4; but that case is an express authority to show that the affidavit need not be in the form there given. The only consequence will be, that the plaintiff will not be obliged to pay the costs of justification if the bail are allowed.

PATTESON, J.—It is desirable there should be no confusion in the practice in these cases. The practice before the rule in *T.* T. 1 *Will.* 4, in country bail, used to be to send the affidavit of justification up to town at the same time with the bail papers. The affidavit however was not used until the bail were excepted to. But if a defendant now chooses to proceed under the new rules, he cannot afterwards turn round and say he will not be bound by those rules. A party who has given notice of bail justifying according to the new rules, has thereby adopted them, and shall not be allowed afterwards to depart from the form of affidavit thereby given. I am not aware that this point has been expressly determined by any of the Courts, but it is desirable that the practice should be settled.

(*a*) 1 Dowl. P. C. 103. (*b*) *Anon.* 1 Dowl. P. C. 115.

Bail Court.

BISHOP *v.* LEIGH.

An action was referred to an arbitrator, and the defendant paid a sum awarded against him, but not the costs of the cause, as they had not been taxed. A fiat then issued against him, after which the plaintiff taxed his costs:—*Held*, first, that those costs were proveable under the fiat;—secondly, that the defendant having paid them to the Sheriff on an attachment before he obtained his certificate, the Court would order them to be repaid to him afterwards, the Sheriff having still the amount in his hands.

THE defendant was indebted to *Bishop* for work and labour, and an action having been commenced, it was by agreement referred to an arbitrator on the 2d of *March*, 1835. The costs of the cause were to abide the event, and the costs of the reference were to be in the discretion of the arbitrator. On the 21st of *April* the award was made, stating that the defendant was indebted to the plaintiff in the sum of *2l. 8s. 3d.*, and ordering it to be paid on the 1st of *May*. The arbitrator also awarded that the costs of the reference should be equally divided between the parties. The defendant paid the sum awarded on the 1st of *May*, but not the costs of the cause, they not having been taxed. On the 12th of *June* a fiat in bankruptcy issued against the defendant. On the 17th of *June* the agreement to refer the cause was made a rule of Court, and on the 2d of *November* the costs of the cause were taxed. On the 25th of *November* an attachment issued against the defendant for non-payment of the costs, and on the 10th of *December* he was arrested. On the 11th he paid the sum for which he was arrested on the attachment, to the Sheriff, giving him notice not to pay it over to the plaintiff, and was discharged out of custody. On the 9th of *January*, 1836, the defendant obtained his certificate under the fiat, which was properly inrolled. The defendant having obtained a rule to show cause why the money which he paid to the Sheriff should not be repaid to him,

Martin showed cause.—The question is, whether the certificate under the fiat entitles the defendant to have the money paid back to him. It is submitted on the part of the plaintiff, that this money having been paid before the defendant obtained his certificate, he is not entitled to have it repaid. There is nothing in the sections 121 and 126 of the Bankrupt Act, 6 *Geo.* 4, c. 16, to authorize the repayment of a sum of money obtained from a bankrupt by a creditor between the issuing of the *fieri facias* and the granting of the certificate, neither is there any case deciding to that effect. This is a precisely similar case. This claim for costs was not proveable under the fiat. All the cases decide that unliquidated damages are not proveable, and these costs are in the nature of unliquidated damages. The *King* v. *Davis*(*a*) is a decision in point, that these costs were not proveable. [*Patteson*, J.—The question here is, whether these costs do not follow the principal debt.]—Here there has been no judgment; the reference was by agreement, and the case is not, therefore, within the 58th section of the Act. [*Patteson*, J.—This point was before me in the case of *Metcalf* v. *Watling*(*b*).]—In that case there was a judgment, and it was therefore within the 58th section.

Dampier, contrà.—The plaintiff might have taxed his costs at any time after the award was made, but instead of that he held over, and did not tax them until after the defendant became bankrupt. That delay on his part is not to prejudice the defendant. [*Patteson*, J.—How was it that cause was not shown against the rule for the attachment?]—The defendant had not then obtained his certificate. This award is either in the nature of a judg-

(*a*) 9 East, 318. (*b*) 2 Dowl. P. C. 552.

ment, and within the 58th section of the Act, or else the costs were a contingent debt, and proveable under the 56th section. The case of *The King* v. *Davis* was decided before the statute 6 *Geo.* 4, c. 16, and it was partly in consequence of that decision that an alteration was introduced into that Act with respect to the proving of costs under a fiat. The money being still in the hands of the Sheriff, who is the officer of the Court, may be ordered to be returned.

PATTESON, J.—I cannot distinguish this case from *Metcalf* v. *Watling*. In that case, after examining into the cases on the point, I was of opinion that the costs for which the cognovit was given were barred by the certificate. The case of *Wyborne* v. *Ross* (*a*) was in that case much relied on in argument, but that decision was doubted in the case of *Vansandon* v. *Crosbie* (*b*), where Lord *Tenterden* says he could not see the ground on which it was decided. The case I thought the nearest to the one then under consideration was that of *Ex parte Poucher* (*c*), in which it was decided that the costs of an action upon contract, where the verdict was before and the judgment after the bankruptcy, were proveable. That is the view I then took of the subject, and I think I was right in that decision. That case is like the present; there the judgment was after the bankruptcy, but the verdict was before. Now what is the present case but an award that the defendant shall pay what is found to be due on taxation, and this award was made before the fiat issued. In that case the whole of the authorities were examined, as well as in the case of *Jacobs* v. *Phillips* (*d*), in the Court of *Exchequer*. The last was a case where the defendant had been arrested on an attachment for the non-payment of costs, and after remaining in custody he was discharged, the claim for costs being proveable under the fiat. That case is very like the present; but the Court said, "Taking all the circumstances into consideration, we think there was no agreement to pay these costs. Our decision, however, does not depend on that question. We think there was an *ascertained* claim previous to the bankruptcy, which might, therefore, have been proved under the fiat, and therefore the defendant is entitled to be discharged." The only difference here is, that this is a claim which *might be* ascertained. The award was for a sum certain, and the costs were to abide the event. These the plaintiff might any day have ascertained on taxation. He did not choose to do so, and by his lying by the nature of the debt is not altered. Under these circumstances, and reverting to the cases of *Metcalf* v. *Watling*, and *Jacobs* v. *Phillips*, I can see nothing to distinguish this case. The only other question is, whether the Court can interfere. I think, as the money is still in the hands of the Sheriff, who is the officer of the Court, it may be done, and that therefore the rule must be made absolute.

Rule absolute.

(*a*) 2 Taunt. 68.
(*b*) 1 Chit. 16.
(*c*) 1 Glynn & Jam. 385.
(*d*) 2 Dowl. P. C. 716.

Bail Court.

The KING *v.* The CORPORATION OF WELLS.

A mandamus will be granted to hold a Court, though above 200 years have elapsed since it was last held.

BY a charter of Queen *Elizabeth* power was given to the Mayor of *Wells* to hold a Court of Record for pleas of debt, &c., and to have a prison for debtors. This Court had not been held for more than 200 years, there were no Court-rolls, no known practice, no person fit to preside as judge in the Court, no gaol for debtors, and no funds from which to pay the expenses of holding a Court. A rule *nisi* for a *mandamus* to hold a Court having been obtained on the part of a person who wanted to sue for a debt,

Erle showed cause.—In *The King* v. *Havering-atte-Bower* (*a*) and *The King* v. *Hastings* (*b*), only fifty years had elapsed since the last Court was held. Here more than 200 years have elapsed, and the Court will presume that the right to hold the Court no longer exists. There is not a vestige remaining of the Court, or of the practice in it, and under these circumstances this Court will not grant a *mandamus*.

Rogers, contrà, was stopped by the Court.

PATTESON, J.—I do not see that I have any discretion on the subject; but I think I am bound to grant the *mandamus*. The parties must qualify themselves for carrying on the business of the Court. A similar *mandamus* has been granted against the Corporation of *Thetford*, and another against the Corporation of *Windsor*, after seventy years *non user* of the Court, and I cannot make any distinction between those cases and the present.

Rule absolute.

(*a*) 2 Dowl. & Ryl. 176, n.; 5 Barn. & Ald. 691.

(*b*) 1 Dowl. & Ryl. 148; 5 Barn. & Ald. 692, n.

CHUBB *v.* NICHOLSON.

A motion to set aside a writ of summons for irregularity must be made within four days.

ON a motion to set aside a writ of summons, on account of irregularity in the form of the indorsement,

F. Robinson showed cause.—This application was made too late, seven days having elapsed between the service of the writ and the application for the rule; *Hinton* v. *Stevens* (*c*).

Knowles, contrà.—This application was made before the time for entering an appearance. In the case cited it was a notice of declaration that was irregular. The rule, that application must be made within four days, will not apply to all cases.

PATTESON, J.—It seems to me that rule is applicable to a writ of summons, and this rule must therefore be discharged.

Rule discharged.

(*c*) *Ante*, 521; 4 Dowl. P. C. 283.

FRODSHAM *v.* ROUND.

The sum indorsed on the writ being above 20*l.*, but the sum claimed by the particulars being less, the Court will not discharge a rule for judgment as in case of nonsuit, on an undertaking to try before the Sheriff.

STEER showed cause against a rule for judgment as in case of nonsuit, and offered to give a peremptory undertaking to try the cause before the Sheriff, the sum claimed being under 20*l.*

George, contrà.—The debt indorsed on the writ exceeds 20*l.*, though by the particulars less than 20*l.* is claimed: the peremptory undertaking therefore must be to try at the next assizes.

PATTESON, J.—The Act 3 & 4 *W.* 4, c. 42, s. 17, only gives power to the Court to order an action to be tried before the Sheriff where the sum "*indorsed on the writ*" does not exceed 20*l.* The practice has been to allow the plaintiff to amend his writ, and my practice at chambers has been, to allow the defendant to pay the new sum indorsed within a certain time, in discharge of the action. As the case at present stands, I can only discharge the rule on a peremptory undertaking to try the cause at the next assizes. Application should be made to amend the writ.

A rule was then drawn up to amend the indorsement on the writ to the sum claimed, and to order a writ of trial, and the plaintiff to give a peremptory undertaking to try before the Sheriff, unless the defendant should pay the new amount indorsed on the writ, in discharge of the action, within a certain time.

CLARIDGE *v.* SMITH.

The Court will not deprive a plaintiff of his costs under the 43d *Eliz.*, because the action might have been brought in a Court of Requests, the trial having been before the sheriff on a writ of inquiry.

IN this case judgment had been suffered by default, and a writ of inquiry executed. The cause of action arose within the jurisdiction of the *Southwark* Court of Requests. A rule was then obtained to show cause why a suggestion should not be entered to deprive the plaintiff of his costs, or why, on payment of the damages assessed upon the writ of inquiry, without costs, the proceedings should not be stayed.

J. Bayley showed cause.—The 22 *G.* 2, c. 46, s. 6, and 46 *G.* 3, c. lxxxvii. s. 13, on which this rule is founded, are repealed by 4 *G.* 4, c. cxxiii. s. 14, 16.

Thomas, contrà.—The Court, nevertheless, by analogy with the case of *Dunster* v. *Day* (*a*), may deprive the plaintiff of his costs, under the statute 43 *Eliz.* c. 6, even though the trial had been before the under-sheriff on a writ of inquiry.

PATTESON, J.—It is plain that the enactments on which this rule is founded are repealed. It is then suggested that the Court has power to deprive the plaintiff of his costs, under the statute 43 *Eliz.* c. 6. That statute gives the power to the Judge before whom the action is tried. This was tried before the under-sheriff, and how can I say it is a fit case to deprive the plaintiff of his costs, without hearing the evidence.

Rule discharged with costs.

(*a*) 8 East, 239.

Bail Court.

DOE *d.* WILLS *v.* ROE.

An affidavit in support of a rule from the tenant in ejectment to confess lease and entry only, without ouster, on account of a question of joint tenancy being likely to arise, must show that the tenant is interested in the question.

A Rule had been obtained to show cause why the person served with the declaration in this ejectment should not be at liberty to confess lease and entry only, without ouster, on an affidavit made by the person served, that no actual ouster had been committed by the deponent, that he was lessee under a person who was a joint-tenant, and that he believed the ejectment might involve a question between joint-tenants.

Chilton showed cause.—The affidavit on which this rule was granted is insufficient. It does not appear, as it should do, that the person making it is interested in the question; it does not even appear that he was in possession of the premises; and it should also have stated further, that no ouster had been committed by any under-tenants.

Cooke, contrà.—This case is within the principle of the case of *Doe* d. *Gigner* v. *Roe* (*a*), and the only question is, whether the tenant in possession, who is a lessee, is not intitled to the same privilege of confessing lease and entry only, that his landlord, who is a joint-tenant, would be. The title is admitted, and the only question is as to the ouster. No hardship will be incurred by this rule being made absolute.

PATTESON, J.—It seems to me this rule ought never to have been granted. The person who makes this affidavit is not himself a tenant in common, nor a joint-tenant, but he holds under another who is. Why should not his landlord come in to defend the ejectment? The affidavit only states that the deponent believes the trial may involve a question between joint-tenants. It is the loosest thing I ever heard. The rule must be discharged with costs, as parties ought to come here with satisfactory affidavits.

Rule discharged with costs (*b*.)

(*a*) 2 Taunt. 397; and see *Anon.* 7 Mod. 39.
(*b*) See the form of the affidavit in Tidd's Practice.

SMITH *v.* DIXON.

The Court allowed the defendant to add a special plea, stating that a certain contract was not in writing, it being uncertain whether that could be given in evidence under the general issue.

THIS was a rule calling on the plaintiff to show cause why the defendant should not be at liberty to add a plea to those he had already pleaded. The action was for non-delivery of goods, to which the defendant obtained leave from *Alderson*, J. to plead several pleas, but he refused to allow him to plead that there was no contract in writing as required by the Statute of Frauds. *Alderson*, J., however, said that if that could not be given in evidence under the general issue, the defendant should be at liberty to apply to the Court. The Court of *Exchequer* had since intimated, in another case, that it could not be so given in evidence, whereupon this rule was obtained.

Archbold showed cause, and said that this defence was a mere formal ob-

jection; to which the Court would not listen. In *Cox* v. *Rolt* (*a*), the Court refused to allow a plea of the Statute of Limitations, as not being a defence on the merits.

Wightman, contrà.

PATTESON, J.—It seems to me, the only object of the defendant is to be able to give in evidence the want of a contract in writing. That is merely his original intention. I think he should be at liberty to add this plea; and under the circumstances, the costs of this rule should be costs in the cause.

Rule absolute.

(*a*) 2 Wils. 253.

Ex parte ROY.

CROWDER moved for a rule calling on an attorney, who had become bankrupt, and on his assignees, to show cause why they should not deliver up certain deeds. The attorney and his partner, as solicitors to the applicant, held the deeds in question, which were the title-deeds to a large estate. The partner absconded, whereupon a fiat in bankruptcy issued against both partners, and the assignees took possession of these deeds, together with the other property of the bankrupts. Application had been made to the assignees, and they had refused to give up the deeds. [*Coleridge*, J.—The difficulty is, whether the Court has any summary authority over the assignees.]—If the rule calls on the assignees *and* the attorney to show cause, it will be sufficient. [*Coleridge*, J.—I think it is a fallacy to suppose that the rule being also against the attorney, will help to give the Court authority over the assignees.] —The assignment will not pass these deeds to the assignees, which are the deeds of another person, unless the attorney had a lien, which is not claimed in this case: the bankrupt, therefore, may be deemed still to have possession of them. It will be a great inconvenience if the Court will not grant this rule in cases like the present, where an attorney becomes bankrupt.

The Court has no power to call on the assignees of an attorney, who has become bankrupt, to deliver up title-deeds of a client, which have come into their possession under the fiat.

COLERIDGE, J.—My impression is against the application; but I will take time to consider the case.

Cur. adv. vult.

COLERIDGE, J. afterwards refused the rule, as the Court had no power over the assignees.

Crowder then moved for a rule calling on the attorney alone, which was granted.

Rule *nisi* granted.

STANLEY *v.* PERRY.

R. SMITH moved for a rule to take money out of Court, which had been paid in, to abide the event of an issue directed under the Interpleader

A rule to take money out of Court, paid in to abide the event of an issue under the Interpleader Act, is only a rule nisi.

Bail Court.

STANLEY v. PERRY.

Act, 1 & 2 *W.* 4, c. 58. The plaintiff in the issue had neglected to try it, as directed by the rule made by the Court, and he cited *Scales* v. *Sargeson* (*a*), to show that the rule might be absolute in the first instance.

PATTESON, J.—In that case it was only contended that the party was not intitled to the costs of the rule that was then being argued, because, if application had been made, the rule would have been consented to. This rule must be a rule *nisi* only.

Rule *nisi* granted.

(*a*) 3 Dowl. P. C. 707.

WILD *v.* RICKMAN.

After judgment of *non-pros*, a rule for the defendant to take out money deposited in lieu of bail is *nisi* only.

CLARKSON moved for a rule to take out a sum of money deposited in lieu of bail, under the statute 7 & 8 *G.* 4, c. 71, s. 2, the defendant having signed judgment of *non-pros* for want of a declaration. He submitted that the rule might be absolute in the first instance.

PATTESON, J.—I think this rule must be a rule *nisi* only.

Rule *nisi* granted.

AUSTIN *v.* GRANGE.

It is no objection to an affidavit that the words "before me," in the jurat, are struck out, and "By the Court" inserted.

CHANNEL moved for a rule to show cause why the special service of a declaration should not be good on an affidavit sworn in Court, which was originally prepared to be sworn before a judge at chambers, but afterwards the words "before me," in the jurat, were struck out, and the words "By the Court" inserted. He submitted that was no objection to the affidavit.

PATTESON, J. thought it was not.

Rule granted.

KRELL *v.* JOY.

Judgment allowed to be signed on a warrant of attorney, on an affidavit that the defendant had been seen alive within ten days.

GREAVES, on the 14th of *January*, moved for leave to sign judgment on an old warrant of attorney, on an affidavit sworn on the 12th of *January*, stating that the defendant had been "seen alive within ten days." He referred to the case of *Watts* v. *Bury* (*b*).

PATTESON, J.—That is sufficient.

Rule granted.

(*b*) *Ante*, 371; 4 Dowl. P. C. 44.

DOE d. DOWNES *v.* ROE.

WHATELEY moved for judgment against the casual ejector. The affidavit stated, that the tenant in possession was a sheriff's officer, that he had been served with a copy of the declaration, and was told to appear to it and plead, but did not state that the deponent had read over and explained the meaning of the declaration. That, he submitted, was unnecessary, as it was sworn that he appeared to be acquainted with the intent of the said declaration. The tenant being a sheriff's officer, was likely to be acquainted with the object of such a service.

Rule *nisi* for judgment against the casual ejector granted, where, on the service of the declaration, it was not explained to the tenant, who appeared to understand it.

PATTESON, J.—You may take a rule *nisi*.

Rule *nisi* granted.

DOE d. TUCKER *v.* ROE.

J. BAYLEY moved for judgment against the casual ejector. *John* and *Mary Tomkins* were jointly in possession of the premises. Service had been made on *John Tomkins* on the premises. On *Mary Tomkins* being asked for, he answered she was up-stairs, and had been bedridden for years. The person who made the service then told *John Tomkins* to take the declaration up-stairs and to read it to *Mary Tomkins*. He took it up, and was heard reading and explaining it to some one, and *John Tomkins*'s wife said it was to *Mary Tomkins*.

Rule for judgment against the casual ejector granted, on an affidavit stating that the deponent had heard a person read and explain the declaration in another room to some one, whom he was told was the tenant, and was bedridden.

PATTESON, J.—That is sufficient.

Rule granted.

DOE d. GRIMES *v.* ROE.

R. V. RICHARDS moved for judgment against the casual ejector. The affidavit on which he moved stated that the deponent went to the premises to serve *Elizabeth Morgan*, the tenant in possession; that she refused to open the door, but the deponent showed her the declaration and notice, and explained their contents. She refused to take the declaration and notice, and immediately afterwards the deponent served them on her son on the premises, and explained them to him. It was sworn that the son was believed to be living with his mother, and that the latter was endeavouring to avoid service.

Rule *nisi* for judgment against the casual ejector granted, the declaration having been read and explained to the tenant, who refused to take it, whereupon it was served on her son.

PATTESON, J.—It does not follow that the mother ever got possession of the declaration, but you may take a rule *nisi*.

Rule *nisi* granted.

Bail Court.

DOE d. STURCH *v.* ROE.

Rule for judgment against the casual ejector refused, where it had been served on an agent of a mortgagor on the premises, and on his clerk at another place.

HOLLIST moved for judgment against the casual ejector. The declaration was served on a person named *Akehurst* on the premises, who said he had six months since received possession from one *Richards* at the termination of his tenancy. *Akehurst* was agent for *Chapman*, who was mortgagor of the premises. Service had afterwards been made on a servant of *Chapman* at his residence at *Camberwell*, and then on a clerk at his office in *London*. On calling a second time, the clerk said his master had probably got the declaration, as he had been there, and he could not find it.

PATTESON, J.—I cannot grant even a rule *nisi*. There does not appear to be any difficulty in serving the mortgagor himself. The affidavit does not say that he keeps out of the way to avoid service.

Rule refused.

BROOM *v.* STITTLE.

On the same motion the Court granted leave to stick up a rule *nisi* to compute, and afterwards the rule absolute in the K. B. Office.

BALL last term had leave to stick up notice of declaration in the King's Bench Office, it having been impossible to find the defendant. He now asked for leave to stick up a rule *nisi* to compute, and afterwards the rule absolute on an affidavit, showing what endeavours had since been made to find the defendant.

PATTESON, J., granted leave for both. (*a*)

(*a*) But see *Martin* v. *Colvill*, 2 Dowl. P. C. 694.

ORTON *v.* FRANCE.

It is no excuse for the delay of a whole term on a motion to set aside an order of a judge, that a person had been ill and unable to leave his house to make an affidavit.

GURNEY moved for a rule to show cause why the order of a judge, made on the 8th of *October*, should not be set aside. The delay there had been in making this application was owing to the illness of a person, who was unable during the whole of last term to leave his house in order to make an affidavit. As the person lived in *London*, a commissioner could not go to him to take his affidavit.

PATTESON, J.—That is not a sufficient reason, the application is too late.

Rule refused.

MASTERS *v.* CARTER.

An affidavit in which the initial only of one of the defendant's christian names was stated in the title, held bad.

ON a rule to show cause why the verdict in an action of replevin should not be set aside, and a new trial granted,

J. Jervis showed cause, and took a preliminary objection, that the defendant's name in the intituling of the affidavit on which the rule was moved, was *Thomas J. Carter*, his second christian name being *James*, which ought to have been written at length.

Fish, contrà, contended that it might be so written.

PATTESON, J.—It was bad to have written a name in this way in process until very lately. This is not an action on a bill of exchange, where the defendant's initials alone are known. His name is stated at full length in the record. The objection is fatal.

Rule discharged.

The KING *v.* The MARQUIS OF DOWNSHIRE.

King's Bench.

INDICTMENT for obstructing certain roads in the parish of *East Hampstead*, in the county of *Berks*. *Plea:* not guilty. At the trial before *Park*, J., at the *Berks* Spring Assizes, 1834, it appeared that the roads were nine in number; that is to say, Nos. 1 and 2 footways, (as laid down in the plans both of the prosecutor and defendant, which agreed,) and Nos. from 1 to 7 inclusive, highways: the former (No. 1) being called in the evidence and upon the pleas, "*Bond's Lane*," the latter (No. 7) being called in the report "The Road to the North," and by the plans also appearing to go in that direction. Into No. 1 highway (*Bond's Lane*) ran before the inclosure, the roads over certain commons designated by the Nos. 2, 3, and 4, in both the plans respectively; and into No. 7, or "The Road to the North," ran the Nos. 5 and 6, also passing over commons, and also laid down in the plans of the prosecutor and defendant. As to the roads generally they were found by the jury, or admitted by the defendant's counsel, to have been public; that is to say, the two first-mentioned to have been public footways, and the seven last-mentioned to have been public highways. In order to show that the several roads had been stopped up, the defendant as to No. 2 footway, and No. 7 highway, relied on a certain order of justices, dated 28th of *March*, 1827, and as to Nos. 5 and 6, before described as leading into No. 7, it was contended that they were virtually stopped up by the same order. As to the rest, *viz.* No. 1 footway, and No. 1 (*Bond's Lane*), and Nos. 2, 3, and 4, leading into it, certain acts of commissioners under a statute, 1 & 2 *Geo.* 4, c. 32, (Session 1821), intituled "An Act for inclosing Lands within the Manor of *East Hampstead*, in the County of *Berks*," were relied on. This Act con-

1. Power was given by a local Act to commissioners of inclosure to divide, alter, turn, or stop up roads, and "all roads which should not be set out or finally ordered and directed to be set out and continued as aforesaid, should be for ever stopped up and extinguished, and should be deemed and taken as part of the lands and grounds to be divided and allotted." Provided, "that no roads passing or leading through any of the old inclosures should be stopped up, diverted, turned, or in any other way altered, without an order for that purpose under the hands and seals of two justices:"—*Held*, that a footway and a highway passing through old inclosures were not stopped up by the operation of the award, in which they were not set out and continued, there being no order of justices for the purpose: —*Held*, also, that highways passing over waste land and running into the highway above mentioned, were also not stopped up by the effect of the award.

2. An order of justices made under the above proviso, stated that the justices having particularly viewed the public roads, and being satisfied that the highways &c. intended to remain and be the public highways, &c. in future, had been continued, or have been set out or properly found, and made safe and convenient, and that the roads and footway thereinafter described were unnecessary to be continued, did order them to be stopped up and extinguished:—*Held*, that the order did not sufficiently show that the proceeding took place on the view of the justices; and therefore that the roads were not in point of law extinguished:—*Held*, also, that roads leading into them were also not stopped up by the order.

King's Bench.

The KING
v.
The Marquis of DOWNSHIRE.

tained a clause (*a*) under which the commissioners appointed by the Act, by their award, allotted the waste lands over which the roads passed, but did not set out or continue them as roads: on which it was contended that they were stopped up and extinguished. The roads over the waste lands were the continuation of roads between the old inclosed lands in the parish, corresponding on the other side of the heath or waste land with roads through the old inclosures of other parishes. The order of justices, which applied to roads passing or leading through old inclosures, was in the following form:—

"We, &c., three of his Majesty's justices, at a special sessions, &c., held by us, &c., on &c., in pursuance of the authority vested in us in and by an Act of Parliament made and passed in the first and second years of the reign of his present Majesty King *George* the Fourth, intituled 'An Act for inclosing Lands within the Manor and Parish of *East Hampstead*, in the County of

(*a*) And be it further enacted, that the said commissioners shall, and they are hereby authorized and required in the first place, before they shall proceed to make any of the divisions and allotments directed to be made by this Act, to set out and appoint all and every such public carriage roads and highways, in, through, and over the lands and grounds hereby directed to be divided and allotted, or in, through, and over any of the old inclosed lands or grounds within the said parish, as they shall judge necessary, and to divert, alter, turn, or stop up any of the present public or private carriage roads or highways, or footpaths, in, through, or over any part of the said parish of *East Hampstead*, as the said commissioners shall think proper, provided the roads and highways to be set out and appointed by the said commissioners shall be and remain thirty feet wide, at the least, and be set out in such directions as shall upon the whole appear to them most commodious to the public; and the said commissioners shall ascertain the same by marks and bounds, and prepare and sign a map in which such intended roads shall be accurately laid down and described, and cause the same, when so signed, to be deposited with their clerk for the inspection of all persons concerned; and as soon as may be afterwards, the said commissioners shall give notice in the said paper called *The Reading Mercury*, or some other public newspapers then published or circulated in the said county of *Berks*, and also in and by writing, to be affixed upon the principal door of the parish church of *East Hampstead* aforesaid, of their having so set out such roads, and deposited such maps as aforesaid, and also of the general lines of such intended carriage roads; and shall also appoint in and by the same notice a meeting to be held by the said commissioners, at some convenient place in *East Hampstead* aforesaid, or within eight miles thereof, and not sooner than fourteen days from the date and publication of such notice, to take the same into consideration; and if any person who may be injured or aggrieved by the setting out of such roads shall attend at such meeting, and object to the setting out of the same, then the said commissioners, together with any justice or justices of the peace, residing or acting in or for the division in which the said parish of *East Hampstead* is situate, and not being interested in the said division and allotment, shall hear and determine such objection, and the objections of any other such person, to any alteration that the said commissioners, with any such justice or justices, may in consequence propose to make; and the said commissioners, together with such justice or justices as aforesaid, shall, and they are hereby required, according to the best of their judgment, upon the whole, to order and finally direct how such carriage roads shall be set out, and either to confirm the said map, or make such alterations therein as the case may require; and all roads, highways, ways, and paths, in, through, and over the said parish of *East Hampstead*, or any part thereof, which "shall not be set out," or finally ordered and directed to be set out or continued as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this Act, and shall be divided and allotted accordingly: Provided always, that none of the present roads within the said parish of *East Hampstead* shall be shut up or discontinued, until the roads which shall be intended to remain or be the public roads in future, shall be set out in the manner by this Act directed, and until the same shall be properly formed and made safe and convenient for horses, cattle, and carriages: Provided also, that no roads passing or leading through any of the old inclosures within the said parish shall be stopped up, diverted, turned, or in any other way altered, without an order for that purpose under the hands and seals of two of his Majesty's justices of the peace for the said county of *Berks* not interested in the repair of such roads, in the manner and subject to appeal, and giving such notice as is directed by an Act passed in the fifty-fifth year of the reign of his said late Majesty, intituled, "An Act to amend an Act of the thirteenth year of the reign of his present Majesty, in so far as the same relates to Notice of Appeal against turning or diverting a Public Highway, and to extend the Provisions of the same Act to the stopping up of unnecessary Roads."—Sect. 18.

Berks;' and of an Act therein recited of the forty-first year of the reign of his late Majesty, King *George* the Third, cap. 109; and of another Act made in the fifty-fifth year of his late Majesty, intituled 'An Act to amend an Act of the thirteenth year of his present Majesty, for the amendment and preservation of the public Highways, in so far as the same relates to notice of Appeal against turning or diverting a public Highway, and to extend the provisions of the same Act to the stopping up of unnecessary Roads,' or any of them, having particularly viewed the public roads or footway within the said Manor and Parish of *East Hampstead* hereinafter particularly described: and we not being interested in the repair of the said roads and footway, and being satisfied that the highways, bridleways, and footways intended to remain and be the public highways, bridleways, and footways in future within the said parish, are continued, or have been set out and properly formed, and made safe and convenient, according to the provisions and directions of the said first-mentioned Act; and that the roads and footway hereinafter described are unnecessary to be continued, do order that the same public roads and footway be stopped up and extinguished (that is to say)," [The order then sets out the roads, including No. 2 footway, and No. 7 highway.]

Several objections (*a*) were taken at the trial to the validity of this order, particularly that it did not sufficiently state that it was made on the view of the justices. It was also contended that the other roads were shut up and extinguished by the operation of the award. A verdict was found for the defendant, with liberty for the prosecutor to move the Court to enter a verdict of guilty as to all or any of the roads which upon the evidence should not appear to have been legally stopped. A rule *nisi* having been obtained accordingly, in *Trinity* Term last,

Jervis, *R. V. Richards*, and *J. C. Talbot* showed cause, and cited *Wood* v. *Veal* (*b*) and *White* v. *Reeves* (*c*).

Ludlow, Serjt., Sir *W. Follett*, and *D. Maclean*, in support of the rule, cited *Logan* v. *Burton* (*d*), *Harber* v. *Rand* (*e*), *Thackerah* v. *Seymour* (*f*), and *Rex* v. *Washbrook* (*g*), on the effect of the award in stopping up the roads; and *Rex* v. *Worcestershire* (*Justices*) (*h*), in support of the objection that it did not sufficiently appear on the order that the proceeding took place on the view of the justices.

Lord DENMAN, C. J., in this term, (26th *January*,) delivered judgment.—This was an indictment against the defendant for obstructing certain footpaths and highways in the parish of *East Hampstead*, in the county of *Berks*, tried before *Park*, J. at the Spring Assizes at *Reading*, 1834, when a verdict was found for the defendant, with liberty for the prosecutor to move this Court to enter a verdict of guilty as to all or any of the said roads which upon the evidence should not appear to have been legally stopped up.

(*a*) The argument also on the rule extended to those objections; but as the judgment proceeded wholly on the objection stated above, the others have been omitted.
(*b*) 5 Barn. & Ald. 454.
(*c*) 2 Moore, 23.
(*d*) 5 Barn. & Cress. 513.
(*e*) 9 Price, 58.
(*f*) 1 Cromp. & Mees. 18.
(*g*) 4 Barn. & Cress. 732.
(*h*) 8 Barn. & Cress. 254.

King's Bench.

The KING v. The Marquis of DOWNSHIRE.

[After stating the description of the roads, as before stated, his lordship proceeded as follows.]—The roads were found, or admitted by the defendant's counsel, to have been public, that is to say, the two first-mentioned to have been public footways, and the seven last-mentioned to have been public highways. The burden, therefore, of showing that they ceased to be such, or, in other words, had been legally stopped, clearly lay upon the defendant. For this purpose, as to No. 2, footway, and No. 7, highway, a certain order of justices, bearing date 28th *March*, 1827, was relied upon; and as to the Nos. 5 and 6, before described as leading into No. 7, that they were virtually stopped by the same order. As to the rest, viz. No. 1, footway, and No. 1, highway, (*Bond's Lane,*) and Nos. 2, 3, and 4, leading into it, certain acts of commissioners under the statute 1 & 2 *Geo.* 4, c. 32, Session 1821, intituled "An Act for inclosing Lands within the Manor of *East Hampstead,* in the county of *Berks,*" were relied upon. Indeed it was by some of the counsel for the defendant contended, that what had been done under the above cited Act was effectual for stopping up all the roads, and that the order of justices, as to those to which it applied, was *ex abundanté cautela* only and superfluous. It may therefore be convenient perhaps first to consider the last-mentioned ground of defence as applicable to all. By the Act in question commissioners are empowered to make new roads, and also "to divert, turn, alter, or stop up any of the present public or private carriage roads or highways or footpaths over the said parish of *East Hampstead,* as they shall think proper." They are also directed to prepare and sign a map describing the roads, and to give certain notices therein prescribed, and to hold a meeting for the purpose of hearing objections and complaints, in which they are to be assisted by a justice or justices of the peace for the division in which the said parish of *East Hampstead* is situated; the said commissioners and such justice or justices to have power to confirm or alter the said map. Then comes the clause upon which reliance upon behalf of the defendant is placed: "And all roads, highways, and paths in, through, and over the said parish of *East Hampstead,* or any part thereof, which shall not be set out or finally ordered and directed to be set out and continued as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this Act." It has therefore been argued, that as none of those roads have been set out and continued, they are at once extinguished. We think, however, that it is unnecessary to do more than to refer to the proviso contained in the very clause which confers the above-mentioned powers upon the commissioners, for the purpose of showing that the argument has no weight: "Provided also, that no roads passing or leading through any of the old inclosures within the said parish shall be stopped up, diverted, turned, or in any other way altered, without an order for that purpose under the hands and seals of two of his Majesty's justices of the peace for the said county of *Berks,* not interested in the repair of such roads, which is to be subject to appeal in the manner therein directed." We consider this to be decisive, and that consequently as to No. 1, footway, and No. 1, highway, (*Bond's Lane,*) which are uncovered by any such order, they still exist in point of law, as a foot and highway respectively, passing as they do undoubtedly according to both the plans "through old inclosures." It is scarcely necessary to add, that the force of

this proviso seems to have been felt, or else, why was an order of justices procured for Nos. 2 and 7 (foot and highway) respectively? We have next to consider the effect of No. 1, highway, (*Bond's Lane*,) being still an existing highway, so far as Nos. 2, 3, and 4, highways leading into it are concerned. We call them highways, because, as has already been observed, they were found, or admitted to be so, subject of course to the effect of the proceedings which we have already noticed. Their leading over commons is clearly a circumstance wholly immaterial as to their character of public highway or not; and assuredly they may, and indeed must be such, if, in the direction leading from *Bond's Lane*, they terminate (as in *Bond's Lane* they do,) in an ancient and public highway. The consequence therefore seems to be, and we think is, that *Bond's Lane* still remaining in law a highway, those above-mentioned (2, 3, and 4,) remain so likewise. It seemed at first as if another course (laid down upon the prosecutor's plan) had been intended to be substituted for, and to supersede the last-mentioned roads, Nos. 2, 3, and 4. It is obvious, however, that this cannot be, for there is no public communication between that course which we are noticing, and *Bond's Lane*, that communication (such as it is) being expressly laid down as a private road. We have lastly to examine the effect of the order of justices above adverted to, by which (independent of the supposed stoppage by their not being continued as roads by the commissioners,) No. 2, footway, and No. 7, highway, are supposed to have been legally stopped, or, in other words, we have to examine the validity of the order of justices. That order is in the following form: (his lordship read the order.) Now in ascertaining how far this order can be sustained or not, it is to be premised that it must be made "upon view" of the justices. So says the statute; and accordingly we consider that an inquiry is not open to us whether any other mode of proof be sufficient to inform and satisfy them: actual inspection is to be the foundation of their jurisdiction. And perhaps a knowledge of the state of the country (necessary and commodious passage and communication, &c.,) may be better so acquired than otherwise. So it is written, however. Now upon the subject of the jurisdiction of justices of the peace, we are not aware that there is any material distinction taken by the Courts between the mode of construction of an order of justices and of a conviction by them. Whatever favourable intendment can be made in support of the former, when once the essential point of jurisdiction is established, may be made. The case of *Rex* v. *Hullcott* (*a*) may be referred to upon this point. This point, therefore, being (as we conceive it is) perfectly clear, the question is, whether the original allegation of "a particular view" does necessarily or by fair construction extend over the whole order, up to the passage which directs the stoppage. Or rather, does not the statement "of being satisfied, &c.," stand wholly independent of the original allegation of view? Whatever might have been the inference if the recital had been continued in an unbroken chain, from the beginning to the end, the case is otherwise here. The clause containing the original and material allegation of "a view" is separated in a very marked manner from that wherein the satisfaction of the justices and the grounds of it are contained. It would be a very violent and forced construction, as we think, to refer the grounds of the procedure by the justices to the view, as stated in the earlier part of the order, rather than to

(*a*) 6 Term Rep. 587.

King's Bench.

The KING v. The Marquis of DOWNSHIRE.

some other means by which their judgment was influenced, and themselves "satisfied," as declared in the subsequent part of that order. We think that it does not by any fair or reasonable inference (and such only ought we to apply) follow that the motive operating upon the justices was "the view only." They might, consistently with a fair and reasonable construction of the order, have been influenced by other proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported. That is our opinion, and therefore No. 2, footway, and No. 7, highway, stand in the same position as the other roads respecting which we have already pronounced our opinion. We have only to add, that the effect of the order of justices being removed, Nos. 5 & 6, (branches, if they may be so called, of No. 7, because leading into it,) are in the same situation with respect to No. 7, that 2, 3, and 4, are with respect to No. 1, highway, (*Bond's Lane.*) It is not necessary, therefore, to repeat the reasons which induce us to arrive (as to them) at the same conclusion. The result, therefore, is, that a verdict must be entered for the Crown as to all the roads above particularly specified.

Verdict entered for the Crown.

KELLY *v.* CURZON.

An affidavit of debt "for money had and received by the defendant for and on account of the plaintiff and at his request," instead of "to and for the use of the plaintiff," is not sufficient.

THE *Attorney-General* obtained a rule to show cause why the writ of *capias* on which the defendant had been arrested should not be set aside, and why the defendant should not be discharged out of custody. The ground he relied on was the insufficiency of the affidavit of debt, which stated that the defendant was indebted to the plaintiff "for money had and received by the defendant for and on account of the plaintiff and at his request."

Alexander showed cause.—In *Coppinger* v. *Beaton* (*a*), an affidavit was held sufficient which stated the money to have been had and received on account of the deponent, without saying that it had been received by the defendant. That fact is expressly stated in the present instance. The test applied in that case was "that it is sufficient to allege that the defendant is indebted in a certain sum of money, specifying the cause of action, and it could not be said that he was indebted unless the money had been received by him." That shows that the affidavit here is fully sufficient. [*Littledale*, J.—The word "indebted" is not sufficient to supply any defect. Perjury could not be assigned on the statement of the defendant being indebted, but only on the statement of facts whence that conclusion is drawn.]—The expression "for and on account of," is equivalent to that which is usually employed "to and for the use of the plaintiff."

The *Attorney-General* in support of the rule.—*Coppinger* v. *Beaton* has been often overruled; *Taylor* v. *Forbes* (*b*), *Cathrow* v. *Hagger* (*c*). It is now quite clear, that unless there is a positive statement of the mode in which the money is due, no perjury can be assigned. He was stopped.

(*a*) 8 Term Rep. 338.
(*b*) 11 East, 315.
(*c*) 8 East, 106.

Lord DENMAN, C. J.—It is quite clear that this affidavit is insufficient. In *Pitt* v. *New* (*a*) it is said, "the fact of one man's having paid money to the use of another, does not (unless it has been paid at the request of that other,) give him any cause of action against that other, because a man cannot of his own will pay another man's debt, and thereby convert himself into a creditor." It is quite consistent with the facts stated in this affidavit, that the plaintiff may not be entitled to recover. It is therefore insufficient, and this rule must be made absolute.

LITTLEDALE, J.—It is quite right that the common forms in use should be always adopted where they are applicable.

WILLIAMS, J. concurred.

Rule absolute.

(*a*) 8 Barn. & Cress. 654.

DAVIS and or^s^. *v.* WILLIS.

ASSUMPSIT for money had and received. *Plea: non assumpsit.* At the trial before *Coleridge*, J. at the sittings after last term in *London*, it appeared that the plaintiffs were clothiers in *Gloucestershire*, and that the defendant was a bill-broker in *London*. The plaintiffs employed a person of the name of *Williamson* as an agent to sell goods for them on commission in *London*. The usual course of his duty was to sell on the usual credit, and to draw on the purchasers bills, which he was to indorse and transmit to the plaintiffs. The usual credit was three or six months. In 1831, *Williamson* effected sales of goods on behalf of the plaintiffs, but, contrary to his duty, on a credit of eighteen months, and drew on the buyers at that date. Instead of sending the bills indorsed to the plaintiffs, he made use of them for his own purposes, and they were discounted by the defendant. These facts being proved, it was contended that a sufficient *primâ facie* case had been made out, to make it incumbent on the defendant to account for his possession of the bills, and show that he had given full value for them. The learned judge thought there was no evidence to go to the jury against the defendant, and directed a nonsuit.

An agent for the sale of goods was authorized to draw bills on the purchasers at the usual credit; and by the course of his employment he was to transmit them indorsed to his principals. He sold goods at a credit beyond the usual period, and drew for the amount; but instead of transmitting them to his principals he used them for his own purposes. They got into the hands of the defendant, a bill-broker, who discounted them:—*Held*, that proof of these facts alone did not afford sufficient evidence of fraud connected with the defendant to give the principals a *primâ facie* right to recover the amount of the bills from him as money had and received, and make it incumbent on him to show that he gave full value for the bills.

The *Attorney-General* now moved to set aside that nonsuit, and have a new trial.—It was proved that *Williamson* drew the bills at a larger credit than he was authorized to give by the terms of his employment; and that the plaintiffs had been defrauded of them. The bills were then traced into the hands of the defendant. This was sufficient *primâ facie* evidence of the proceeds of the bills being money had and received to the use of the plaintiffs, to make it incumbent on the defendant to prove that he gave consideration for the bills. The ordinary *primâ facie* case of the defendant arising from the fact of his being in possession of the bills, was rebutted by the still stronger *primâ facie* case of the plaintiffs, which showed that they had been defrauded of them; *Solomons* v. *Bank of England* (*b*), *Bayley on Bills* (*c*).

(*b*) 13 East, 135, n.

(*c*) Page 373, 4th ed.

King's Bench.

DAVIS v. WILLIS.

Lord DENMAN, C. J.—The case of *Solomons* v. *Bank of England* was much stronger than the present. We should wish, however, to look into that case.

Cur. adv. vult.

Lord DENMAN, C. J. afterwards (21st *January*) gave judgment.—This was a case in which there was a motion to set aside a nonsuit and have a new trial. The ground was, that it was proved that the agent to the plaintiffs in *London* had defrauded them, by drawing bills in a way in which he was not authorized; and that the defendant had discounted them; therefore that the plaintiffs were *primâ facie* entitled to recover from him the amount of the proceeds as money had and received to their use. We think that, even supposing the rule to be the same in such an action for money had and received, as in an action on the bills, there was not sufficient to call on the defendant to give evidence of the consideration he gave for the bills. There was no fraud whatever connected with him to make him affected thereby. There will therefore be no rule.

Rule refused.

JOHNSON *v.* HUDSON and MORGAN.

In an action for a libel contained in a song which had been published by singing in the streets, a witness who had sung it was called, but the identical copy from which he had sung it could not be produced. Notice to produce the original having been given, proof that a copy produced was similar to that which had been sung, and that the manuscript had been delivered by *H.*, one of the defendants, to *M.* the other, to print: that *M.* accordingly printed 1000 copies, and sent 300 of them to *H.*: and that several were delivered by him to the witness, was held sufficient evidence from which a jury might infer a joint publication by both the defendants.

CASE for libel against *Hudson* the publisher, and *Morgan* the printer of a song, which had been published by having been sung about the streets. *Hudson* pleaded *not guilty*, and *Morgan* allowed judgment to go by default. At the trial before Lord *Denman*, C. J. at the last sittings in *Middlesex*, the copy of the song which was produced could not be identified as that which had been actually sung. Notice to produce the original having been given, evidence was adduced to show that songs of a similar description had been stuck about the premises of the defendant *Hudson*—that a thousand copies of these songs had been ordered by *Hudson* to be printed at *Morgan*'s —that 300 copies had been taken by a man named *Albert*, who was in the service of *Morgan*, and by him delivered in a parcel to *Hudson:* and *Albert* swore that he believed the songs he had delivered to be the same as that which had been exhibited to him in Court. It was further proved, that *Hudson* had employed a man named *Jones* to sing certain songs about the streets; and *Jones* stated, that on one occasion he had received a song from *Hudson*, but had destroyed that particular paper;—that afterwards he went to the shop of *Hudson*, and asked for some more songs—that *Hudson* told him to get them from the servant, and that she took up a parcel of papers containing apparently about 300, and gave him 100 of them—that these were songs which he had sung, and he believed them to be the same as that which was shown to him in Court. On this evidence, it was objected that the song produced had not been sufficiently identified as that which had been sung, and that it could not be read to the jury. The learned judge, however, left the case to the jury, who returned a verdict for the plaintiff, damages 30*l.*, with liberty to move to enter a nonsuit.

Kelly now moved for a rule to show cause why there should not be a

nonsuit entered, or a new trial granted. There is no evidence of a joint publication. If there is not, *Hudson* is entitled to a verdict in his favour. The suffering of judgment by default by *Morgan* ought not to prejudice *Hudson*. There must still be strict proof of a joint publication by the two defendants. There must be proof of such a publication with respect to a libel identical with that which is produced before the Court and jury, in order to sustain this verdict. That was the principle of law with respect to the publication of libels in newspapers till the 38 *Geo.* 3, c. 78, and was recognized in that statute. In this case no paper was produced to the Court which any witness could swear had come out of the hands of *Morgan*. There was no evidence to prove that any paper produced to the Court and jury was a paper which had been published by *Morgan* and *Hudson*. There was no evidence that the paper destroyed was printed by *Morgan*. If the action had been against *Morgan* alone, and he had pleaded the general issue, if evidence of this sort could be held sufficient to convict him of the publication, there was no necessity for such an enactment as is to be found in the 38 *Geo.* 3, c. 78.

LITTLEDALE, J.—I think that there was evidence of a joint publication. The evidence is, that *Jones* went to the shop of *Hudson* and got copies of these songs, which he says he sung, sold, or distributed. No one of the copies which he thus got was produced, but secondary evidence was given of the contents of the paper he received. In order to do that, *Albert*, who was the servant of *Morgan*, produced a paper, and said that he had been desired by *Morgan* to print papers similar to that to the number of a thousand. None of the thousand could be produced and identified. The question is, whether there was sufficient evidence of publication by *Morgan* to go to the jury. I think that there was. Though in a great many cases better evidence is given, I think that this was admissible.

WILLIAMS, J.—I am of the same opinion. It seems to me that the evidence against *Morgan*, of his being the printer of this particular paper, in consequence of the proof by *Jones* that the original had been destroyed, is sufficient to raise the conclusion that he was the printer. It has been submitted, that nothing short of the proof that this actual paper was sung by *Jones* can satisfy the necessity of the case. It seems to me, however, that circumstances may lead to the conclusion as well as direct proof. If you take the evidence of *Albert* and *Jones* together, you will find another fact, which goes beyond those which were noticed by my brother *Littledale*, namely, that *Albert* did himself deliver 300 out of the 1000 at the shop of *Hudson*. It is material to show that these 300 were those out of which *Jones* had 100 for the purposes of singing and distribution. Now what is the evidence which shows this? Why, that *Jones* went to the shop and said that he wanted songs to sing. *Hudson* referred him to the servant, and showed him about 300 songs lying together in a parcel of songs corresponding in bulk and number with the parcel which had been carried in by *Albert*, so that it seems to me that the songs received by *Jones* came out of the parcel which had been delivered by *Albert*. We cannot say that this was so plainly proved as to be clear beyond all doubt; but still there was

King's Bench.

JOHNSON v. HUDSON.

reasonable proof of the fact, and quite sufficient to be left to the consideration of the jury.

COLERIDGE, J.—I am quite of the same opinion with my brothers *Littledale* and *Williams*. I fix on the point of the song which *Jones* sang and destroyed, as being the libel in question. The point for us now to consider is, whether this particular copy was one of those printed by *Morgan*. It was so, if it was one of the thousand of which *Morgan* was the printer. It was proved that *Morgan* had printed 1000 copies of a song, and had delivered 300 by his servant, *Albert*, at the shop of *Hudson*. Where then did *Jones* get the songs which he sang about the streets? Why, he went to the shop of *Hudson*, and got from *Hudson*'s servant, by *Hudson*'s direction, a quantity of songs out of a larger quantity tied up in a parcel in *Hudson*'s room. I will not say what the result of the evidence is, but I think that there is evidence on which the jury might come to some conclusion that the one in question was one of the thousand. That is enough in this case. The jury had a right to look at the size and shape of the paper, and its general appearance, to see whether they believed that the paper produced in Court was part of the thousand copies printed by *Morgan*, and of the 300 delivered at the house of *Hudson*, and by *Hudson*'s order delivered to *Jones*. The witnesses did look at it, and stated their belief that it was one of the papers. There was clearly sufficient evidence to go to the jury.

Lord DENMAN, C. J.—The particular paper which the defendants were charged with having printed and published was one of those which *Jones* had sung. He swore that he sang it and that he destroyed it. That let in secondary evidence of its contents. He said that he could swear that the one shown to him in Court was an exact copy of that which he had destroyed. Then came the question, whether that which he destroyed was one of the thousand printed by *Morgan*. The journeyman printer said that it was the same—that he took part of the thousand to *Hudson*'s shop—that it was printed upon paper of the same kind—thus affording more precise evidence of its identity, and that he took these songs as a parcel of goods to be delivered to *Hudson*, the papers having the name of *Morgan* on them. Taking all these matters together, I think that there was a sufficient case on which the jury might express an opinion, and I must confess that I think that there was no reasonable doubt that this was one of the very papers taken by *Albert* to the house of *Hudson*, and afterwards circulated by *Hudson*.

Rule refused.

The KING *v.* The JUSTICES OF GLOUCESTERSHIRE.

Under the 5 & 6 *Will.* 4, c. 76, s. 8, places which are made parts of boroughs, are made so for all purposes; therefore, since the passing of that Act, county justices have no jurisdiction over places which are included within the metes and bounds of a borough.

RULE for a *mandamus* to the Justices of *Gloucestershire*, to enter at the Sessions an application to inrol an order made by two Justices of the County, for diverting and turning a public footway in the parish of *Clifton*.

By the Boundary Act, (2 & 3 *Will.* 4, c. 64,) and the Reform Act, (2 *Will.* 4, c. 45,) *Clifton* was made part of the borough and city of *Bristol*. By the Poor Law Amendment Act, (5 & 6 *Will.* 4, c. 76, s. 7,) the boundaries of certain boroughs, including *Bristol*, were to be then settled by the Boundary Act; and by s. 8, every place and precinct which shall be included within the metes and bounds of any borough, shall be part of such borough, and none other; and those boroughs which are counties of themselves, shall be part of such county, and none other. The sessions refused to entertain the application, on the ground, that by the operation of the latter Act, the parish of *Clifton* was altogether taken out of the jurisdiction of the County Justices.

The *Attorney General* and *Maule* showed cause. They relied on the 5 & 6 *Will.* 4, c. 76, s. 8, having transferred the jurisdiction over the parish of *Clifton* to the City Justices for all purposes.

Greaves, in support of the rule, contended that the Act only operated to transfer the jurisdiction for the special purposes of the Act, and not for all purposes. He referred, in support of that construction, particularly to sections 38, 62, 64, 76, 79, 92, 96, 98, 101, 103, 105, 109, 110, 111, 114, 117, and 118; and to the cases of *Rex* v. *Sainsbury* (*a*), *Talbot* v. *Hubble* (*b*), *Blankley* v. *Winstanley* (*c*), *Bates* v. *Winstanley* (*d*), and *Rex* v. *Clark* (*e*).

Cur. adv. vult.

Lord DENMAN, C. J. subsequently in this term (*Feb.* 1) gave judgment.—We have gone carefully through the Act of Parliament, and we are of opinion that the transfer of the jurisdiction from the Justices of the County to those of the City, is as complete as words can make it in a statute. By the operation of the 7th and 8th sections of the 5 & 6 *Will.* 4, c. 76, we are of opinion that this change has been effected, notwithstanding the difficulties which may possibly arise when questions are brought before us, on the other numerous sections which have been cited to us. The consequence is, that the parish of *Clifton* is now a part of the city of *Bristol*, for the purpose in question, and not part of the County of *Gloucester*. Consequently, this rule for a *mandamus* must be discharged.

Rule discharged.

(*a*) 4 Term Rep. 451.
(*b*) 2 Stra. 1154.
(*c*) 3 Term Rep. 279.
(*d*) 4 Maule & Selw. 429.
(*e*) 5 Barn. & Ald. 728.

POWER *v.* BARHAM.

ASSUMPSIT for the breach of a warranty of four pictures that they were painted by *Canaletti*. *Plea: non assumpsit*. At the trial before *Coleridge*, J. at the last *Middlesex* sittings, it appeared that the plaintiff bought four pictures at a sale by the defendant; and a bill of parcels, in the defendant's hand-writing, was put in. It was in the following form:—

On a sale of pictures, a bill of parcels of four pictures was given, stating them to be Views in *Venice*, and having the word "*Canaletti*:" *Held*, that this was evidence to go to the jury of a warranty that they were painted by that artist; and that it was a correct direction to the jury, to desire them to consider whether the defendant intended so to warrant the pictures, or only to express his opinion on the subject of the artist by whom they were painted.

King's Bench.

POWER v. BARHAM.

"*May* 14, 1832.

"Mr. *N. Power*, Bought of *J. Barham*,

Four pictures, Views in *Venice, Canaletti*, - - £160.

Settled by two pictures - - £50

And a bill at five months - - 110——£160."

"*J. Barham.*"

The learned Judge left it to the jury to consider whether the defendant intended to warrant the pictures as having been painted by *Canaletti;* or only to express his opinion on the subject of the artist by whom they were painted. The jury said, in writing, "We think the bill of parcels is a warranty," and found a verdict for the plaintiff.

The *Attorney General* now moved for a new trial, on the ground of misdirection. In *Jendwine* v. *Slade* (*a*) it was held that the putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he was mistaken, and that it was not the work of the artist to whom it was attributed. Lord *Kenyon* there said, "It is impossible to make this the case of a warranty. The pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion, whether the picture in question was the work of the artist whose name it bore or not. What then does the catalogue import? That in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it."

Lord DENMAN, C. J.—It appears to me that what passed at the trial was perfectly correct; and there was no interference with what is said by Lord *Kenyon* in the case referred to. His expressions must be taken with reference to the particular case before him. In this case, the bill of parcels described the pictures as "Views in *Venice, Canaletti.*" That of itself means nothing. It must be a question for the jury to say what the meaning was, and what was the effect of the expression: whether the defendant meant to warrant that these pictures were painted by *Canaletti*, or merely to make a representation of his opinion on the subject. The jury have found that it was the intention of the defendant to warrant that the pictures were painted by *Canaletti;* and with that finding I think we ought not to interfere. Indeed I should have come to the same conclusion. I will just observe, that *Canaletti* is not a very old painter; and that there might be little or no difficulty in tracing these particular pictures. If so, then the observations of Lord *Kenyon* in *Jendwine* v. *Slade* do not apply in the present instance.

LITTLEDALE, J.—This is a question proper to be left for the consideration of the jury.

WILLIAMS, J.—I am of the same opinion. The expression used is open to two interpretations,—a warranty, or a mere expression of opinion. It is not denied that there may be a warranty on such a subject, and in this case the jury have found that there was a warranty. If parties, therefore, will

(*a*) 2 Esp. 572.

undertake to warrant that pictures are the production of any particular artist, when they are not so, the usual consequences must follow.

COLERIDGE, J. concurred.

Rule refused.

CHAPMAN and Wife, Administratrix of MATTOCKS, *v.* VANDEVELDE.

ASSUMPSIT on a bill of exchange drawn by the deceased, *Mattocks*, upon, and accepted by the defendant. *Plea:* that after the time when the bill became due and payable, and before the commencement of the action, the defendant paid to the said *Mattocks*, in his life-time, the amount of the bill; and that the said *Mattocks* never sustained any damage by the non-payment thereof: concluding to the country. *Special demurrer;* for that the plea contained matter not in denial of the contract, but in confession, and accordance; and that it contained new matter, and ought to have concluded with a verification, instead of to the country.

Joinder in *demurrer.*

1. A plea to an action on a bill of exchange, that after it became due, the defendant paid the amount, and that the holder never sustained any damage by reason of the non-payment thereof at maturity, concluding to the country, was held bad on special demurrer.

2. *Semble*, that such a plea would not be good, even if it concluded with a verification, unless it went on to allege that the payment was accepted in satisfaction.

Butt, in support of the demurrer, was stopped.

Hoggins, contrà.—The conclusion is correct. No new matter is introduced. [*Littledale*, J.—Is not this plea, in fact, a plea of payment in satisfaction, which ought to conclude with a verification? There is no traverse of any matter of fact in the declaration, but only of a mere inference of law.] It is true, that in *Ansell* v. *Smith* (*a*), and also in *Mack* v. *Rust* (*b*), a plea of payment which concluded to the country was held bad on special demurrer, but this case is distinguishable, because here there is an express denial of the fact of non-payment alleged in the declaration. [Lord *Denman*, C. J.—There may be a breach of this contract, and yet the plea may be perfectly true. You say that *Mattocks* sustained no damage. The words themselves have no meaning. The damage is that which results from the breach of contract. You cannot say, consistently, that no damage has been sustained, notwithstanding the breach of contract, which is admitted, unless you go on to say that the payment was accepted in satisfaction.]

Per Curiam.—There must be judgment for the plaintiffs.

Judgment for plaintiffs.

(*a*) 3 Dowl. P. C. 193. (*b*) 4 Dowl. P. C. 206.

MARGETTS *v.* BAYES.

DEBT for goods sold. *Plea:* that the said supposed debt in the said declaration mentioned (if any such there be) did not, nor did any part thereof, accrue due to the plaintiff *infra sex annos.* *Special demurrer:* for

A plea of a defence to the said supposed cause of action, in the declaration mentioned, if any such there be, is bad on special demurrer, because the qualifying hypothetical expression prevents it from being a confession.

King's Bench.

MARGETTS v. BAYES.

that the plea did not confess and avoid or traverse or deny the cause of action.

W. H. Watson, in support of the demurrer, relied on *Gould* v. *Lasbury* (*a*). He was stopped.

C. Jones, contrà.—[Lord *Denman*, C. J. This point has already been decided in *Gould* v. *Lasbury*. It was there held that this form of expression does not amount to a sufficient confession.] He applied for leave to amend, on the ground that the precedents were all in the form used, and that the recent alteration of opinion was not generally known.

Per Curiam.—Judgment must be for the plaintiff, with leave to amend on payment of costs.

Judgment for the plaintiff.

(*a*) 1 C. M. & R. 254.

The Bailiffs and Assistants of GODMANCHESTER *v.* PHILLIPS (*b*).

1. In an action by a corporation, a witness stated on the *voire dire* that he had been a member of the Corporation, but that he was disfranchised. *Held*, that the answer was not conclusive, so as to preclude further inquiry as to the mode of disfranchisement.

2. He stated, in answer to such inquiry, that he was disfranchised by having resigned at a corporate meeting; he did not know the number present on that occasion, but referred to the corporation books, which were in Court. *Held*, that it was competent to refer to those books, to show that there was not a sufficient majority present on that occasion, so as to invalidate the resignation, and show the witness to be still a member of the corporation.

3. A charter granted to a corporation, consisting of two bailiffs, and twelve assistants and commonalty, or the greater part of them, of whom the bailiffs for the time being shall be two, to do corporate acts. *Held*, that the necessary majority must consist of the two bailiffs, and a majority of the twelve assistants; and, therefore, that a meeting, at which the two bailiffs and six assistants were present, was not a good corporate meeting.

4. A release by an individual member of a corporation to the corporation of all his interest in the subject-matter of the action, will not render the corporator an admissible witness in an action of trespass brought by the corporation, for an injury done to the corporation land.

5. The statute 3 & 4 *Will.* 4, c. 42, s. 26, which renders competent witnesses who are interested, by reason of the verdict or judgment being evidence for or against them, on an indorsement of their names being made upon the record, does not apply to such a case.

TRESPASS *quare clausum fregit*. *Pleas:* not guilty, and several special pleas of a right of common by prescription. At the trial before *Bosanquet*, J. at the *Cambridge* Summer Assizes 1834, two persons, *Martin* and *Reeve*, were called as witnesses to show title in the plaintiffs. By the charter the corporation consisted of two bailiffs, twelve assistants, and the commonalty. *Martin* was examined on the *voire dire*, and stated that he had been an assistant, but that he was disfranchised. It was then proposed to inquire how and in what manner he had become disfranchised. It was objected on the other side, that as the objection which arose on the *voire dire* had been answered in the same manner, the answer must be conclusive, and it was not competent to pursue the inquiry any further. The learned judge thought, however, that the question proposed might be asked. The witness then stated that he resigned his office at a corporate meeting, and that the resignation was then accepted; but he could not say how many members of the corporation were then present. He referred to the corporation books which were in Court. By the books it appeared that only the two bailiffs and six of the assistants were present. On this it was objected, that to constitute a good corporate meeting, it was necessary that there should be

(*b*) See this case previously reported 5 Barn. & Adol. 198.

present a majority of the assistants as well as the two bailiffs (*a*); and that a majority of the aggregate number was not sufficient. The learned judge thought that the meeting was a duly constituted corporate meeting, and that the witness having resigned at such meeting, ceased to be a member of the corporation. Both *Martin* and *Reeve* being however occupiers of commonable messuages, and as such entitled to a right of common over the *locus in quo*, a release was given by each of them to the corporation " of all right, title, or interest, to or in respect of all and every right of common whatsoever, whether as freemen of the said borough, or as occupiers of any commonable messuage or premises whatsoever, especially all rights of common upon, &c (the *locus in quo*). The name of each of the witnesses was also indorsed upon the record, under the statute 3 & 4 *Will.* 4, c. 42, s. 26. Upon this being done, their evidence was admitted, and a verdict was found for the plaintiffs. *B. Andrews* obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered, or why there should not be a new trial.

Kelly, *Maltby*, and *J. Bayley* now showed cause.—The answer to the objection arising from the fact of *Martin* being a member of the corporation, as well as the objection itself, came out on the examination on the *voire dire*. The answer of a witness on the *voire dire* is conclusive. As that answer in the present case showed that the objection was got rid of, the defendant was precluded from entering further into any inquiry upon the subject; *Butchers' Company* v. *Jones* (*b*), *Rex* v. *Gisburn* (*c*). [*Coleridge*, J.—In *Butler* v. *Carver* (*d*), it was held, in a case of this description, that where the witness himself produced the instrument, the effect of which was to make him incompetent, it ought to be read. Your argument would go to this extent: that where a witness states that he was a freeman, but that he has been disfranchised, he cannot be examined as to how, or when he was disfranchised.] Even if it was competent to go into an inquiry of that nature, in this case it appears that the witness was duly disfranchised. The meeting at which the resignation was made and accepted was a sufficient corporate meeting; *Com. Dig.* tit. " Franchise, F 30." No doubt, that in order to constitute a sufficient meeting, there must be a majority of the whole definite body; *Rex* v. *Bellringer* (*e*), *Rex* v. *Devonshire* (*f*); but it is quite clear in this case that the charter treats the bailiffs and assistants as together forming only one definite body, and that it was the intention of the charter to require only a majority of that body. The two bailiffs and six of the assistants were present, and there being eight out of a definite body of fourteen, there was a majority of that body present. On this point, *Rex* v. *Greet* (*g*), and *Rex* v. *Headley* (*h*) may be referred to. At all events, the witness did all that was in his power to divest himself of the character of a corporator, and, by so

(*a*) The words of the charter were, " And further, we will, and by these presents, for our heirs and successors, grant to the said bailiffs, assistants, and commonalty of the said borough, or the greater part of them, of whom the bailiffs for the time being shall be two, upon public summonses given them, and being for that end assembled, may and shall have full power and authority, from time to time, of granting, ordaining, and making of laws, statutes, constitutions, decrees, and ordinances whatsoever in writing, reasonably, which to them, or the greatest part of them, of which the bailiffs we will shall be two, seem good."

(*b*) 1 Esp. 160.
(*c*) 15 East, 57.
(*d*) 2 Stark. 433.
(*e*) 4 Term Rep. 810.
(*f*) 1 Barnw. & Cress. 609.
(*g*) 7 Barnw. & Cress. 363.
(*h*) 7 Barnw. & Cress. 496.

doing, to abandon his interest. In *Goodtitle* d. *Fowler* v. *Welford* (*a*) it was held, that if a person who is interested execute a surrender or release of his interest, he may be examined as a witness, although the surrenderee or relessee refuse to accept the surrender or release. Previously to *Doe* d. *Stafford* v. *Tooth* (*b*), no doubt was ever entertained that a member of a corporation might not release his interest to the corporation. There is, however, a distinction between that case and the present. There it was sought to give to a release the effect of conveying an interest in land which the witness had. Here, the only interest which the witness could have, was the interest in the damages to be recovered. The release, therefore, operated to render the witnesses competent. If any objection arises from the fact, that the verdict or judgment would be evidence for or against the witnesses, of the right claimed in this action, that objection has been cured by the statute 3 & 4 *Will.* 4, c. 42, s. 26, and the indorsement of the names of the witnesses on the record.

B. Andrews, in support of the rule, relied on *Rex* v. *Bellringer*, *Rex* v. *Ripon* (*c*), *Rex* v. *Colchester* (*d*), *Rex* v. *Smart* (*e*), *Rex* v. *Ipswich* (*f*), *Rex* v. *May* (*g*), *Salter* v. *Grosvenor* (*h*), and *Brown* v. *Lordon* (*i*), to show that the meeting at which the resignation of *Martin* was made and accepted, was not a good corporate meeting; and that consequently he still continued to be a member of the corporation. He relied on *Doe* d. *Stafford* v. *Tooth*, and *Burton* v. *Hinde* (*k*), to support the proposition, that an individual member of a corporation cannot make a release to the corporation of which he is a member. He contended that the statute 3 & 4 *Will.* 4, c. 42, did not apply to the case, because the witnesses were interested in the subject-matter of the action, and not because the verdict or judgment might be evidence for or against them, and cited *Burgess* v. *Cuthill* (*l*).

Cur. adv. vult.

Lord DENMAN, C. J. afterwards (1 *February*) gave judgment.—In this case the question was, whether the corporation of *Godmanchester* being a party to the action, a member of the corporation could be a witness. When he was called, he stated indeed that he had been a member of the corporation, but that he had been disfranchised. It was thereupon contended, that no objection to his admissibility could after that be taken, as his answer must be considered as being conclusive, upon the question of his being a member of the corporation at the time. Now we are clearly of opinion, that there is no rule of law which prevents an inquiry taking place on that subject, under the circumstances of this case. We are not bound to say what might be the case under a different set of circumstances, or what general rule it might be proper to adopt; but we are clearly of opinion, that when in the course of a trial a witness is objected to on the ground of interest, that objection must prevail, though he state that he has ceased to be

(*a*) 1 Dougl. 134.
(*b*) 3 Y. & J. 19.
(*c*) 6 Salk. 432.
(*d*) 1 P. Wms. 595, n.
(*e*) 4 Burr. 2241.
(*f*) 2 Lord Raym. 1247.
(*g*) 4 Barn. & Adol. 843.
(*h*) 8 Mod. 303.
(*i*) 11 Mod. 225.
(*k*) 5 Term Rep. 174.
(*l*) 1 Mood. & Rob. 315.

interested, if the grounds on which he states that to be the case appear to be insufficient. In this case reference was made by the witness himself to the books of the corporation; and we should have been glad to have found, upon looking at the charter, that the resignation was valid. The definite portion of the corporate body consisted of the two bailiffs and twelve assistants; and at the meeting at which the resignation of the witness was accepted, it appears by the corporation books, that the two bailiffs and six of the assistants only were present. The question is, whether that number can be considered as a majority of the constituent body. We are of opinion, that the authority of the cases is too strong for us to get over, and that we are bound to say that the eight persons present at the meeting in question did not form a majority of the constituent body. The resignation was therefore ineffectually made, and the witness consequently continued to be a member of the corporation, and still had an interest in the subject-matter of the action; and the objection to his admissibility as a witness remained. There was another ground on which it was contended that the witnesses had divested themselves of all interest, by their having personally released the corporation from all claims in respect of the subject-matter of the action. One member of a corporation cannot in law so release the corporation of which he is a member, because he is a constituent portion of the party released. It amounts to a release from himself to himself, and cannot have any operation at all. The release had not therefore any effect in restoring the witnesses to a situation of competency. There was also another ground, which was, that the late statute, 3 & 4 *Will.* 4, c. 42, applied to the case. We are however of opinion, that the statute does not apply to a case like the present; consequently the witnesses remained interested throughout. Under these circumstances, the verdict having been founded upon evidence which was not admissible in point of law, it clearly cannot stand. The question therefore is,—not whether it is to be set aside,—but whether, in lieu of it, a new trial should be granted, or a nonsuit entered. As it seems that no leave to move to enter a nonsuit was granted at the trial, the latter course cannot now be taken. Consequently a new trial must be had; and this rule must be made absolute for that purpose.

Rule absolute.

The KING *v.* The MANCHESTER and LIVERPOOL RAILWAY COMPANY.

RULE for a *mandamus* to be directed to the *Manchester* and *Liverpool Railway Company*, commanding them to issue a warrant under their common seal to the Sheriff of *Lancashire*, to impanel a jury to assess compensation to be made to *William Bathe* and *Benjamin Wraith*, for damage sustained by them, by reason of certain premises belonging to them being required to be taken for the purposes of the railway, under the provisions of the 7 *Geo.* 4, c. 49. By that Act, section 45, the owners and occupiers of

A railway Act (7 *G.* 4, c. 49, *Manchester* and *Liverpool Railway*,) directed compensation to be assessed for damage sustained "by any owner or occupier of, or person interested in lands, tenements, or hereditaments, by reason of the making of the railway:—*Held*, that an assignee of a beneficial lease had no right to claim compensation in respect of a probable chance which he had of having his lease renewed at the end of the term, in consequence of a promise made by his lessor to that effect.

King's Bench.

The KING v. The MANCHESTER and LIVERPOOL RAILWAY COMPANY.

lands, tenements, or hereditaments, through, under, in and upon which the railway, &c is to be made, may accept and receive satisfaction for the value of such lands, &c. and also compensation for the damage to be sustained in making or completing the works. By section 47, the jury, in ascertaining the sum to be paid for purchase, are also to ascertain and assess the compensation and satisfaction to be made for any damages sustained by persons being owners or occupiers, or interested in the lands, &c. for or on account of the detriment, injury, loss, damage, or prejudice, which shall or may accrue or be sustained by reason of the works: such damages and compensation to be separately assessed. By section 48, the jury are to settle what shares and proportions of the damage assessed shall be allowed to any tenant or other person having a particular estate, term, or interest in the premises for such interest. By section 50, tenants at will and lessees for a year are to deliver up possession of the premises on six months' notice. By section 57, tenants or lessees, who are required to deliver up possession before the expiration of their term or interest, are to receive compensation for the value of the unexpired term or interest. Messrs. *Bathe* and *Wraith* were the assignees of a lease of the premises in question, granted in 1816. The reversionary interest had been sold by the lessor to the company. Considerable sums of money had been expended on the premises by the lessees, and the lessor, before he parted with his interest to the company, had promised the lessee that he should have a renewal of the lease at the expiration of the term. The premises, from their local situation, and the length of time during which the business had been carried on in them, had acquired a considerable local value. The company had given notice that they should require possession of the premises at the expiration of the lease; but refused to make any compensation for the right or chance of renewal to which Messrs. *Bathe* and *Wraith* claimed to be entitled. The *mandamus* was applied for in order to recover such compensation.

Wightman showed cause, and distinguished this case from *Ex parte Farlow* (*a*), and *Rex* v. *Hungerford Market Company* (*b*), on the ground that the expressions used in the *Hungerford Market* Act were much stronger than those in the present Act; and that it was upon the wording of that Act alone that those cases had been decided.

Kelly, in support of the rule, contended that the Act must have a liberal interpretation, and that it was intended to apply to interests of the description in question, as well as to those of a strictly legal character. He submitted that the chance of renewal was valuable, and the subject of pecuniary calculation on the sale of the interest of the applicants; and relied on *Ex parte Farlow* and *Rex* v. *Hungerford Market Company*.

Lord DENMAN, C. J.—Unless the words of the Act are sufficiently strong and extensive to include a claim of this description, I do not think that we ought to say that it is a subject-matter of compensation. In the cases alluded to, we thought the words of the *Hungerford Market* Act sufficiently comprehensive to include an interest of the same kind as the present. In

(*a*) 2 Barnw. & Adol. 341. (*b*) 4 Barnw. & Adol. 592, 596.

the present Act, however, there are no words which would justify us in coming to the decision, that this right—or, more properly, chance of renewal,—is an interest for which the parties are entitled to compensation. The *mandamus* ought not, therefore, to go; and this rule must be discharged.

LITTLEDALE, J. and WILLIAMS, J. concurred.

Rule discharged.

HOLLINGSWORTH *v.* COLLINSON.
Same *v.* Forty-six other Persons.

A rule for the consolidation of several actions against the underwriters on the same policy, may be obtained before declaration.

RULE to show cause why the several actions should not be consolidated. Forty-seven several actions had been brought by the same plaintiff against forty-seven underwriters, on the same policy, on the ship *Angerstein*. Declarations had not been delivered, but application had, notwithstanding, been made at chambers to *Coleridge*, J. for an order to consolidate. The learned judge doubting whether, according to the practice, consolidation could be allowed before declaration, refused the application, and directed the matter to be brought before the Court. A rule *nisi* having been obtained by *R. V. Richards*,

Maule, showed cause.—By the old practice there could be no consolidation until issue joined, because it was only allowed where the point to be tried was the same in all the actions: and until issue was joined, it could not be known that the point would be the same. If this was the case before the new rules, by which what was formerly the only plea pleaded is taken away, *à fortiori* is it so now, when, in consequence of different pleas, the issue may be very different. [*Coleridge*, J.—It is said, that since the new rules, it has been the practice at chambers to allow of consolidation after declaration and before issue joined. This application, however, goes a step further. I could not see that there was any distinction in principle; therefore it was that I wished the matter to be brought before the Court.]—Even if consolidation be allowed before issue is joined, it cannot on principle be allowed before declaration; because it is only allowed where the actions are brought for causes of action which might be joined; *Cecil* v. *Brigges* (*a*); and until there is a declaration, it cannot be known for what cause of action the plaintiff proceeds. It does not follow that because the action is against the underwriters on the same policy, that the declaration will be in the same terms against them all. The remarks in *Doyle* v. *Anderson* (*b*) are in point.

R. V. Richards, in support of the rule, contended that the whole practice of consolidation being the creature of the Court, it was competent to allow it at any time, if, by so doing, the course of proceeding would be benefitted, and costs saved. He also submitted, that there was no distinction between allowing consolidation before declaration or afterwards.

Cur. adv. vult.

(*a*) 2 Term Rep. 639. (*b*) 1 Adol. & Ellis, 635.

King's Bench.

HOLLINGSWORTH v. COLLINSON.

Afterwards, the Court, having taken time to confer with the Judges of the other Courts, said,—We think that the consolidation ought to take place. The rule, therefore, will be made absolute.

Rule absolute.

The KING *v.* The Inhabitants of SPARSHOLT.

By the regulations of a prison, the appointment of the turnkeys or assistants employed was vested in the keeper, subject to the confirmation and approbation of the visiting justices. The salary was annual, and paid by the treasurer of the county, but in all other respects the turnkeys were under the immediate orders of the keeper, who had the power of suspension, but could not make a new appointment until an inquiry had been instituted by the visiting justices. *Held*, that no settlement, by hiring and service, was gained by a turnkey so appointed.

ORDER for the removal of *Edith Rogers* and her three children from *St. Maurice* to *Sparsholt*. On appeal, the Sessions confirmed the order, subject to the following case:—By certain of the regulations for the government of the County Bridewell at *Winchester*, made at the *Easter* Sessions, 1822, and allowed and confirmed by His Majesty's Judges, at the Summer Assizes following, it is provided as follows:—1st. That the right of appointment of the turnkeys or assistants employed in the Bridewell, be vested in the keeper of the Bridewell, in the first instance; but that such appointment be subject always to the approbation and confirmation of the visiting justices. That the keeper of the Bridewell have power to suspend, from the execution of the duties of his situation, any turnkey or assistant, and to appoint a temporary assistant in his room, but shall, within three days of such suspension, report to the visiting justices the cause for his having so acted; and shall not, until an inquiry has been instituted by the visiting justices, permanently appoint any other person in the room of the turnkey or assistant suspended from office. 2nd. That the turnkeys of the Bridewell shall receive the payment of their salaries from the treasurer of the county; but shall in all other respects be under the immediate orders and control of the keeper of the Bridewell, by whom they may, for disobedience or improper behaviour, be suspended from their situations. 3rd. That the appointment and removal of the keeper of the Bridewell shall be made in strict conformity with the Acts of Parliament for the regulation of the same. 4th. That any turnkey of the Bridewell who may be convicted of drunkenness, shall be dismissed by the visiting justices from office. 5th. Rule 20 commences thus, "That no turnkey or any other officer attached to the Bridewell, shall," &c. 6th. Rule 21 commences thus, "The keeper of the Bridewell, and the officers of the prison, together with the keeper's family and servants, shall be required," &c. 7th. Rule 26 provides "That the keeper of the Bridewell shall not, without the permission of the visiting justices, lodge or board in his house, any person other than his own family and servants, and those of his assistants." In the year 1822, and after the allowance and confirmation of the said regulations, *Robert Rogers* (since deceased) was appointed to the office of second turnkey in the said Bridewell, by the keeper, in accordance with the above cited regulations, at the annual salary of 45*l.*, which was afterwards advanced to 50*l.*, on his promotion to the office of first turnkey. There was no agreement made, at the time of engaging *Rogers*, for any particular length of service, or for any notice previous to its determination. The said *Robert Rogers* duly served in that situation from 1822 to 1826, when he married the pauper *Edith*; after which, he continued in the same situation till 1833, when he was discharged at a few days' notice for misconduct, in conformity with the above regulations. The salary of the said *Robert Rogers* was always paid by the treasurer of the county, and he

resided, during the whole period of his employment as turnkey, in the Bridewell, which is situate in the parish of *St. Bartholomew Hyde*, near *Winchester*, in the county of *Southampton*. The question for the opinion of the Court was, whether, under the circumstances above stated, the said *Robert Rogers* acquired a settlement, by hiring and service, in the said parish of *St. Bartholomew Hyde*.

Sir *W. Follett* and *Rawlinson*, in support of the order.

Dampier, contrà, was called on by the Court.—*Rogers* was appointed to a situation in which he acted as servant to the keeper of the Bridewell, and his salary was annual: there was, therefore, a yearly hiring of him as a servant, and he gained a settlement by his service; *Turner* v. *Robinson* (*a*), *Fawcett* v. *Cash* (*b*). No objection arises on the ground that the hiring was not general, but only to do a particular kind of work. The same thing was the case in *Rex* v. *Sandhurst* (*c*), yet it was held that a settlement was gained by a man who was only hired to do work about *Sandhurst* College.

Lord DENMAN, C. J.—In *Rex* v. *Sandhurst* the question was, whether the party could be a servant under the particular circumstances. The Sessions there thought that the hiring was general; and the only doubt was, whether the hiring, by the principal of the establishment, was sufficient to confer a settlement. Here, the appointment of *Rogers* by the keeper of the Bridewell, was expressly subject to the approbation and confirmation of the visiting justices; *Rogers* was, therefore, under their control, and never was the servant of the keeper. I should not feel bound by the expression of the finding that *Rogers* was appointed to an office, if the nature of the contract showed that the relation of master and servant was contemplated. That is not, however, the case here. I am of opinion, therefore, that no settlement was gained.

LITTLEDALE, J.—I also am of opinion that *Rogers* was not a servant at all under this contract.

WILLIAMS, J. concurred.

Order confirmed.

(*a*) 5 Barn. & Adol. 789.
(*b*) 5 Barn. & Adol. 904.
(*c*) 7 Barn. & Cress. 557.

The KING *v.* The Inhabitants of ST. GILES IN THE FIELDS.

An occupation of a house by a person who was in the habit of taking in labouring people to sleep in some of the rooms, sometimes letting a bed, sometimes half a bed; the letting being generally by the night, but sometimes by the week, is, notwithstanding, an actual occupation within the 1 *Will.* 4, c. 18.

ORDER for the removal of *Thomas Barrow*, *Josephine* his wife, and their five children, from *St. Giles in the Fields* to *St. Marylebone*. On appeal the Sessions confirmed the order, subject to the following case:—In the year 1831 the pauper became the tenant of a house in the appellant parish, at the yearly rent of 24*l*. He held the house for three years, paid the rent,

King's Bench.

The KING v. The Inhabitants of ST. GILES IN THE FIELDS.

and complied with all the requisites of the statutes 6 *Geo.* 4, c. 57, and 1 *W.* 4, c. 18; if, under the circumstances hereafter mentioned, he was sufficiently in the actual occupation of the house in question. The pauper resided in the house with his family; the furniture in all the rooms was his; and he was in the habit of taking in labouring people to sleep in some of the rooms, sometimes letting a bed, sometimes half a bed,—the letting being generally by the night,—but in some instances it appeared that a bed had been let for the period of a week. The persons who thus slept in the house had no right to the rooms during the day; the pauper and his family having constant access and control over the whole of the house, and the pauper always retaining the keys of all the rooms in his own possession. In the instances of letting for a week, which were of rare occurrence, the pauper let the bed only, reserving to himself the right of putting another bed in the same room, at any time, if he thought proper. The question for the opinion of the Court was, whether, under the circumstances stated, the pauper actually occupied the house, within the meaning of the above-mentioned statutes. If the Court should be of opinion that the occupation was sufficient, the order of the Quarter Sessions to be quashed; if otherwise, to stand confirmed.

Adolphus, in support of the order, relied on *Rex* v. *St. Nicholas, Rochester* (*a*), and *Rex* v. *St. Nicholas, Colchester* (*b*).

J. L. Adolphus and *W. Clarkson, contrà*, were stopped.

Lord DENMAN, C. J.—It is quite clear, that in this case there was an actual occupation of the house by the pauper, within the meaning of the 1 *Will.* 4, c. 18. This is the case of a person keeping the control over the whole house himself. His letting out the beds, as stated in the case, will not prevent him from being in the actual occupation of the house. It is almost the same case as that of an innkeeper who occupies by his guests.

LITTLEDALE, J.—The whole statement in the case, shows that the pauper held the exclusive occupation of the whole house.

WILLIAMS, J. concurred.

Order of Sessions quashed.

(*a*) 5 Barn. & Adol. 219,
(*b*) 2 Adol. & Ellis, 599; *S. C.* 1 Harr. & Woll. 47.

The KING *v.* The Inhabitants of AMERSHAM.

The consideration expressed in an indenture of apprenticeship was 10*l.* paid to the master by a public charity, the trustees of which were parties. The apprentices' grandfather, however, agreed, without the knowledge of the trustees, to pay, and did pay to the master, after the execution of the indenture 15*l.* more: *Held*, that the indenture was void by 8 *Anne*, c. 9, s. 39, for not having inserted in it the full sum contracted for with, or in relation to, the apprentice.

ORDER for the removal of *Anna Seamons*, from *Aylesbury* to *Amersham*.

On appeal the Sessions confirmed the order, subject to the following case:—*William Hardy*, by his will, dated the 5th *August*, 1719, devised certain estates to trustees, their heirs and successors, upon trust in them reposed, that they should for ever thereafter faithfully distribute and employ the rents and profits of the said estate, towards the putting out poor children appren-

tice, in such manner as in the said will thereinafter declared and directed. The respondents proved an indenture, made and executed on the 8th day of *May*, 1827, between *William Rickford*, *Woodfield Blake Eagles*, *Robert Dell*, *John Churchill*, and *Thomas Dell*, Esquires, trustees of the public charity of *William Harding*, the testator above-mentioned, deceased, for putting out poor children apprentices, of the first part; *Anna Seamons*, daughter of the late *Joseph Seamons*, a poor person, and settled inhabitant within the parish of *Aylesbury*, in the county of *Bucks*, of the second part; *Catherine Read*, spinster, of *Amersham*, in the county of *Bucks*, of the third part; whereby *Anna Seamons*, by the nomination and placing of the said *William Rickford*, *Woodfield Blake Eagles*, *Robert Dell*, *John Churchill*, and *Thomas Dell*, bound herself apprentice to *Catherine Read*, for the term of seven years, to learn the art or business of a dress-maker; and the said *Catherine Read*, in consideration of the sum of 10*l.* of lawful money to her paid by the said trustees, out of the said public charity of the said *William Harding*, covenanted to teach *Anna Seamons* the art or mystery of a dress-maker. Previously to the execution of the indenture, *Catherine Read* attended a meeting of the trustees, held on the 8th of *May*, and afterwards the indenture was executed by *Anna Seamons* and *Catherine Read*, in the presence of, and attested by, *John Parrott*, agent to the trustees of the said charity, and he paid the sum of 10*l.* (mentioned in the indenture) to *Catherine Read*, the mistress, as a consideration for taking the pauper as an apprentice. *Catherine Read* signed a receipt, indorsed upon the indenture,—"Received on the day and year within written, by me, the within-named *Catherine Read*, of and from the within-named trustees, by the hands of *William Rickford* and *Woodfield Blake Eagles*, treasurers, the sum of 10*l.*, being the full consideration money within mentioned to be by the said trustees to me paid." The pauper served three years under the indenture of apprenticeship. The appellants proved that Mrs. *Dawney*, the wife of Mr. *Dawney*, the pauper's grandfather, had (by his authority) applied to *Catherine Read* to take *Anna Seamons* apprentice in the month of *April*, in the same year, and upon that occasion the premium which Mrs. *Dawney* agreed to pay, and which *Catherine Read* agreed to receive, was 25*l.*; that this arrangement was made at *Amersham;* that *Catherine Read* did not know until she came to *Aylesbury*, and was introduced to the trustees, that any part of the premium she was to receive was to be paid from the funds of *Harding's* charity; and being informed of the fact, was at first unwilling to take the apprentice, but eventually agreed to take, and did take her, as such apprentice. After the indenture was executed, *Catherine Read* received from Mrs. *Dawney* 15*l.* to make up the amount which the latter had agreed to pay, and which the former had agreed to receive. Upon her going before the trustees to complete the binding, no conversation took place between her and the trustees, or any of them, or between her and Mr. *Parrott*, respecting any additional sum to be paid to her by Mrs. *Dawney*, with the apprentice; nor was it in evidence that the trustees or Mr. *Parrott* knew, or suspected, that any additional sum was so paid or contracted for, beyond the sum mentioned in the indenture. The question for the opinion of the Court was, whether, under the circumstances stated, the above-mentioned indenture was void, by reason of the full consideration for the binding not being set out in the indenture according to the provisions of the statute 8 *Anne*, c. 9, s. 39. If the Court should be of opinion that it

King's Bench.

The KING v. The Inhabitants of AMERSHAM.

was void, then the Order of Sessions was to be quashed; but if they should be of opinion that it was not, then the Order of Sessions was to stand.

Sir *W. Follett* and *Bligh*, in support of the Order of Sessions.—The sum of 10*l.* mentioned in the indenture was the only consideration. There was no contract valid in law for the payment of any further sum. The sum which was in fact given by the grandfather, was no part of the original sum agreed for. *Rex* v. *Bourton-upon-Dunsmore* (*a*) shows, that where there is no valid contract to pay a sum beyond that which is mentioned in the indenture, it is not avoided, though a further sum may actually have been paid. That doctrine is recognized in *Rex* v. *Baildon* (*b*), and though the decision was there against the indenture, it proceeded on the ground that there was a binding contract to pay the further sum. In *Rex* v. *Aylesbury* (*c*) the same principle is recognized.

The *Attorney-General* (with whom was *Channell*), *contrà*, was stopped.

Per Curiam.—The case of *Rex* v. *Baildon* is decisive of this. It was decided there that an indenture, executed under circumstances similar to the present, was void altogether.

Order quashed.

(*a*) 9 Barn. & Cress. 872.
(*b*) 3 Barn. & Adol. 427.
(*c*) 3 Barn. & Adol. 569.

The KING *v.* The Inhabitants of WHISTON.

1. It is to be presumed that notice has been given to the overseers of the parish in which a parish-apprentice is bound, according to 56 *Geo.* 3, c. 139, s 2, before the allowance is made by the justices; and it is not necessary for a party who relies upon the indenture at the Sessions to prove that such notice has been given.
2. Such notice is necessary.

ORDER for the removal of *Thomas May*, and *Millicent* his wife, and their three children, from *St. Mary, Nottingham*, to *Whiston*. On appeal, the Sessions confirmed the order, subject to the following case. The pauper, a boy of, and legally settled in, the township of *Dinnington*, in the West Riding of the county of *York*, was, in *December*, 1818, pursuant to an order of two justices of the said riding, bound apprentice by the churchwardens and overseers of the poor of *Dinnington*, to *James Herring*, residing within the township of *Whiston*, in the same riding, by indenture duly signed and allowed, for a term therein mentioned, and served the said *James Herring* under the said indenture for more than forty days in the said township of *Whiston*. The township of *Dinnington* is about five miles from the township of *Whiston*. Each township maintains its own poor separately, and both townships are within the same county, and within the jurisdiction of the peace of the two magistrates who made the order for the binding, and who afterwards signed their allowance of the indenture. On the hearing of the appeal at the General Quarter Sessions of the Peace for the town and county of *Nottingham*, the respondents refused to call evidence to prove that notice was given by the overseers of the poor of *Dinnington* to the overseers of the poor of *Whiston*, of their intention to bind out such apprentice. No evidence having been offered by the appellants to prove that such notice was not given, the question for the opinion of the Court was, whether the respondents were bound to prove that notice was given, under the circumstances above stated.

Whitehurst (with whom was *Hill*) in support of the Order of Sessions.—He contended that, although notice had not been given according to 56 *Geo.* 3, c. 139, s. 2, a settlement was gained; and that, even if a notice had been necessary, it was not incumbent on the respondents to prove it, as the Court would presume that the justices did not allow the apprenticing without proof of notice.

Milner, contrà, cited *Rex* v. *Threlkeld* (*a*) as decisive on the first point; and on the second contended that no such presumption could arise.

Lord DENMAN, C. J.—It appears to me that this is a very clear case, which may be decided on the broad principle, that where the order on the face of it appears to be good, it must be presumed to be so until the contrary is shown. This is an affirmative proposition, and not a negative one, which a party cannot be called upon to prove. Here is proof of an order made by justices in the execution of their public duty, which appears upon the face of it to have all the necessary requisites. We must assume that all the preliminaries required by the Act of Parliament were complied with. At all events, if they were not, it was incumbent on the appellant parish to show that fact.

LITTLEDALE, J.—I am entirely of the same opinion.

WILLIAMS, J.—The Act of Parliament is very strong; but we must presume in this case that all was rightly done, unless the contrary was shown by the party who impeached the order.

COLERIDGE, J.—We are only now acting on the general rule, that where a public officer acting in the execution of his duty does a particular act, it is to be presumed that every thing has been done by him which was necessary to make that act valid,—at all events, until the contrary be shown. But it is said we are in this difficulty:—that we call upon the appellants to prove a negative. That is not exactly so: for the order being on the face of it valid, what is required to be proved is an affirmative. *Rex* v. *Haslingfield* (*b*) and *Williams* v. *East India Company* (*c*) are illustrative of the view we now take. The Order of Sessions must therefore be confirmed.

Order confirmed.

(*a*) 4 Barn. & Adol. 229.
(*b*) 2 Maule & Sel. 558.
(*c*) 3 East, 192.

The KING *v.* The Inhabitants of PAKEFIELD.

A pauper hired a tenement for a year: upon the expiration of the year he assigned all his stock, crops, implements, and personal property to a trustee, for the benefit of his creditors. The trustee paid the year's rent out of the proceeds of the sale of that property; and the pauper continued to occupy the house only for the whole year:—*Held*, that as the assignment of the crops gave a right of entry on the lands, there was no sufficient occupation by the pauper to gain a settlement:—*Held*, also, that the payment of the rent by the trustee out of the proceeds of the sale was not a sufficient payment of the rent by the pauper, as the person hiring the tenement.

ORDER for the removal of *Edmund Reeder* and his two children from *Pakefield* to *Walpole*. On appeal the Sessions quashed the order, subject to the following case:—A settlement having been proved in the appel-

King's Bench.

The KING v. The Inhabitants of PAKEFIELD.

lant parish, the Court of Quarter Sessions held, that a subsequent settlement had been acquired in the respondent parish. It appeared that on *Michaelmas-day*, 1832, the pauper entered upon the occupation of a beer house and several acres of land in *Pakefield*, which he had previously hired for a year, at the rent of 30*l.* for the house and land, and 10*l.* for certain brewing utensils in the house, and continued to occupy the house and land until the month of *July* following. On the 17th of that month, being in embarrassed circumstances, he by deed assigned all his farming implements, stock, crops, and all other his personal estate and effects, to one *Thomas Waterson*, for the benefit of his creditors. The deed, which was put in and agreed should be considered as part of the case, was executed by *Waterson* and the pauper, and on the 1st of *August* following, *Waterson* under this deed sold all the pauper's stock, farming implements, furniture, and other effects, and also the crops then growing upon the land. The crops were cut, but the straw and calder were either left upon the premises, or brought back for the use of the incoming tenant. Part of the furniture was purchased for the pauper, but after the sale he was not possessed of any farming implements, or any stock, excepting a pig, which, after the crops were carried off, was turned out to shack upon the land. The pauper paid no rent himself, but *Waterson* paid the landlord 31*l.* 10*s.* towards the rent, 20*l.* 13*s.* in money out of the produce of the sale of the pauper's effects, and 9*l.* 17*s.* by the summer tilths and muck on the land and certain fixtures in the house, which were taken by the landlord at that sum. The pauper and his family, consisting of his wife and four children, continued to live in the house and carry on the business, drawing beer there, and making profit thereof, buying it and bringing it from *Lowestoft* as he wanted it, on which he lived until *Tuesday*, the 8th of *October*, 1833, on which day he removed to a house which he had previously hired at *Yarmouth*, distant about twelve miles from *Pakefield*, taking with him his wife and three children, and all his effects, excepting a few articles of furniture, which were left in the house at *Pakefield*, because the waggon employed by the pauper to remove his goods was not large enough to carry them all. The things left behind were to have been sent to *Yarmouth* on the following day, but were not in fact sent until the *Thursday*. The pauper left the key of the house with his son, with a command not to give it up to the landlord until the *Michaelmas-day*. The son, who had lived with his father, continued to sleep in the house, having his clothes and chest there, until the *Thursday* or *Friday*, and on the *Friday*, which was *Michaelmas-day*, delivered the key to the landlord, and went to lodge at the house of his master, a miller, residing at *Pakefield*, with whom he had boarded from the day his father had left the parish. The pauper and his wife and three children continued to reside at *Yarmouth* from the 8th of *October* for several months, and did not return to *Pakefield* until a short time before they were removed to *Walpole* under the said order. If the Court of King's Bench should be of opinion that the pauper gained a settlement in *Pakefield*, the Order of Sessions to be confirmed, if of the contrary opinion, to be quashed.

B. Andrews and *Austin*, in support of the Order of Sessions.—They contended that the payment of the rent by *Waterson* was sufficient to satisfy the statute. They also insisted that there had been a sufficient occupation by the pauper.

Manning, contrà.—He cited *How* v. *Kennett* (*a*) and *Carter* v. *Warne* (*b*), to show that the legal estate was in *Waterson*; and that therefore there was no sufficient occupation by the pauper. He also contended that the payment of the rent was not sufficient, because it was made out of money over which the pauper had no control.

Lord DENMAN, C. J.—It seems to me that there was neither an actual occupation by the pauper, nor a payment of the rent by the party hiring the tenement. The deed of assignment gave a power of entry on the premises, which destroyed the exclusive occupation. I am also of opinion, that the payment of the rent by the trustee out of the proceeds of the pauper's personal estate was after he had parted with the whole of his property, and cannot be said to be a payment of the rent by him within the meaning of the statute.

LITTLEDALE, J.—There was no actual occupation, because the land had been conveyed away for a valuable consideration: nor was there any sufficient payment of the rent, because it was paid out of funds vested in the hands of the trustee for a particular purpose.

WILLIAMS, J.—A right of entry was necessarily conveyed to the purchasers by the deed; and consequently it is impossible to say that the pauper had the undivided occupation of the tenement. I also agree that the payment of the rent by *Waterson* cannot be considered as a payment by the pauper, and he was the party hiring the tenement.

COLERIDGE, J. concurred.

Order of Sessions quashed.

(*a*) 5 Nev. & M. 1; *S. C.* 1 Harr. & Woll. 391. (*b*) Mood. & Malk. 479.

STUART *v.* GAVERAN.

An affidavit of debt, in which the deponent described himself as "late of *Tyrone*, in the county of *Tyrone*, in *Ireland*, but now in *Dublin Castle*," was held sufficient.

MANSEL moved to set aside the proceedings in this case, for irregularity, on the ground that the affidavit to hold to bail was insufficient, the person making it not having properly described himself. The affidavit described the deponent,—the plaintiff,—"as late of *Tyrone*, in the county of *Tyrone*, in *Ireland*, but now in *Dublin Castle*." He cited *Sedley* v. *White* (*a*), where it was held, that a deponent who has left one place of abode and resides in another, would not satisfy the rule, *Michaelmas* Term, 15 *Car.* 2, by describing himself as *late* of the former.

Per Cur.—That is where he gave no other description. Here he describes his late residence, and where he is at present to be found.

Rule refused.

(*a*) 11 East, 528.

King's Bench.

SPENCER *v.* HAMERTON.

In case, for libel, there was a plea of not guilty, on which the verdict was found for the defendant, and several pleas of justification, on which the jury found for the plaintiff, because the defendant offered no evidence in support of them:—*Held*, that though the defendant was entitled to the general costs, the plaintiff was entitled to the costs of the issues on the pleas of justification, including both the costs of the pleadings, and of evidence provided to rebut them.

ACTION for libel.—*Pleas:* not guilty, and several pleas of justification. At the trial a verdict was found for the defendant, on the plea of not guilty, and for the plaintiff on the pleas of justification, no evidence having been offered upon those pleas by the defendant. On the taxation of costs, the Master allowed to the defendant the general costs of the cause, and to the plaintiff, the costs both of pleading and evidence occasioned by the issues on the pleas of justification. A rule was obtained by the defendant in *Trinity* Term last (*a*), to show cause why the Master should not review his taxation, on the ground that he had done wrong in allowing to the plaintiff the costs of evidence as well as the costs of the pleadings. Against this rule,

Tomlinson showed cause, and *Starkie* was heard in its support.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (12th *Jan.*) delivered judgment.—This was a rule to show cause why the Master should not review his taxation of costs. The action was in case for a libel, in which there were issues joined on a plea of not guilty, and on several pleas of justification. A verdict was found for the defendant on the first issue, and for the plaintiff on the issues on the pleas of justification, inasmuch as no evidence was offered by the defendant on those issues. The Master, in his taxation of costs, allowed to the defendant the general costs of the cause, and to the plaintiff the costs of the issues which had been found for him, including as well the evidence, which had been prepared by the plaintiff to disprove the justifications, as the pleadings. It was contended for the defendant, that the proper course under the Statute 4 *Anne*, c. 16, ss. 4 & 5, was to allow the plaintiff the costs of the pleadings only, and that the rule of *Hilary* Term, 2 *Will.* 4, No. 74, had made no difference; and the case of *Othir* v. *Calvert* (*b*), was particularly relied on. For the plaintiff it was contended, that the practice which had prevailed in conformity with the case of *Othir* v. *Calvert* was wrong in principle, and had been so held by *Parke*, J. in *Hart* v. *Cutbush* (*c*). The fourth section of the Statute of *Anne* permits any defendant, or tenant in any action, or any plaintiff in replevin, by leave of the Court, to plead several matters; and the fifth section provides, "that if any such matter shall, upon a demurrer joined, be adjudged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the issue shall certify that the defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which, upon the issue, shall be found against him." The words, "at the discretion of the Court," have been held to give the Court power, not to refuse the costs, but only to tax them; *Duberly* v. *Page* (*d*), and many other cases. And an avowant in replevin is a defendant within the meaning of the fourth section; *Stone* v.

(*a*) 16th June. 1835.
(*b*) 1 Bing. 275.
(*c*) 2 Dowl. P. C. 456.
(*d*) 2 Term Rep. 391.

Forsyth (*a*). The words of the Statute of *Anne* are general, and without limitation, not pointing to any distinction between costs of the pleadings, and costs of the trial; and reason and common sense dictate, that if the defendant has put the plaintiff to unnecessary expense, by pleading that which turns out either in law or in fact to be unfounded, he should pay the plaintiff that expense, although he may be successful upon the general question. Yet it appears that a practice soon prevailed of limiting the costs to those of the pleadings only. That practice was condemned in the cases of *Brooke* v. *Willett* (*b*), and *Vollum* v. *Simpson* (*c*). It is true that both those cases were actions of replevin, in which the defendant is an actor, which was pointed out by one of the prothonotaries in *Othir* v. *Calvert*, and was supposed to make a difference. That supposition, we think, to be wholly erroneous; for the question turns upon the words of the Statute of *Anne*, and upon the ordinary principles of justice, all of which are equally applicable to replevin and to other actions. So far, therefore, as the decision in *Othir* v. *Calvert* depends on this distinction, we think that it cannot be supported. But in the judgment of the Court it is said, "that the point had been fully considered in *Benett* v. *Coster* (*d*), which was decided on the authority of *Vivian* v. *Blake* (*e*)." Now, neither of those cases touches the point in question. In *Vivian* v. *Blake*, which was in trespass, the defendant pleaded the general issue, and a justification which covered the whole trespass. The plaintiff had a verdict on the general issue, and the defendant on the justification; and the Court held, that the plaintiff was not entitled to any costs; so that the present point could not arise. In *Benett* v. *Coster* the questions were, who should have the general costs of the cause, and whether the defendant should have any costs; but the present question did not arise, at least it is not alluded to in the report, though doubtless it must have arisen in the prothonotaries' office; and, whichever way it was there determined, it does not appear to have been afterwards disputed. *Hart* v. *Cutbush* is an authority the other way, and, as we think, rightly decided; and though we had been led to suppose that the case of the *Duke of Newcastle* v. *Green*, which is there referred to by *Parke*, J., but which is not reported, had been compromised, and not decided, we have been informed by the learned judge himself, that it was decided in the manner stated by him, and that the only compromise was, as to the mode of settling the accounts between the parties, which was arranged before him at chambers. It has been objected, that the consequences of holding that decision to be right will be, that issues which have become immaterial by the finding of the jury upon a particular issue, will always be tried for the mere sake of costs, and that great waste of time and inconvenience and delay to other suitors will be occasioned. We do not think these consequences at all necessary; but even if they were, they are not sufficient to prevent the Statute of *Anne* from having that construction which appears most consonant to the intention of the legislature, and to reason and justice.

Rule discharged without costs.

(*a*) 2 Dougl. 709.
(*b*) 2 H. Black. 435.
(*c*) 2 Bos. & Pull. 369.
(*d*) 1 Brod. & Bing. 465.
(*e*) 11 East, 263.

PALMER *v.* TEMPLE.

1. An agreement in writing entered into for the assignment of a public-house in the occupation of the party himself, together with several cottages in the occupation of tenants, does not necessarily import that actual possession of the cottages is to be given by turning the tenants out.

2. *Semble*, that if a party in such a case insists on actual possession being given, he should state such intention early enough to enable the other party to comply with it.

ASSUMPSIT, to recover back a deposit paid on an agreement for the purchase of a public-house and five cottages. The breach in the declaration stated, that the defendant did not assign the licence pursuant to agreement, nor deliver up possession of the premises which were intended to pass thereby. The first plea denied the contract; the second stated that the plaintiff was ready and willing, and offered to assign the premises, and to perform the agreement in all respects; and the third plea, that the defendant was ready and willing to perform the agreement in all other respects, but that it was agreed that the defendant should not cause the tenants to quit the cottages, but to attorn to the plaintiff, and that the plaintiff had exonerated the defendant from giving the plaintiff actual possession of the cottages. There were replications taking issue on all the pleas. At the trial of the cause before Lord *Denman*, C. J., at *Guildhall*, at the sittings after last term, it appeared that by the agreement, which was in writing, and dated 15th *June*, 1835, it was agreed that it should be carried into effect on the 24th instant, when the licence was to be assigned, and possession of the whole property given. The time for carrying the agreement into effect was afterwards duly enlarged to the 29th of the same month. The parties met on the 29th of *June*, when every thing was done as to the valuation of the stock, &c.; in which labour they were occupied till twelve o'clock at night, when the attorney for the plaintiff required to know whether the defendant was at that time ready to deliver possession of the cottages. It then appeared that four of the cottages were in the possession of tenants to whom no notice to quit had been given. Some evidence was given at the trial to show what had passed between the parties or their attornies on a former occasion with respect to the possession of these cottages. Lord *Denman*, C. J., left this evidence to the jury; and told them that the agreement to give possession of the cottages did not necessarily mean to turn out all the then tenants; and he left it to the jury to say whether the plaintiff meant by his agreement to require possession at once. The jury returned a verdict for the defendant.

Platt now moved for a new trial, on the ground of misdirection. It is clear that at the time stipulated for the performance of the agreement the defendant had not the power to perform it, for he had not given notice to the tenants of the cottages. The evidence of what was said by the parties or their attornies as to the possession of the cottages ought not to have formed the subject of observation in the summing up of the learned judge, for if that conversation was entitled to any weight, it was so for the purpose of varying a written agreement. But a written agreement cannot be varied but by another instrument in writing, *Goss* v. *Lord Nugent* (*a*). The jury ought to have been told that the defendant was not in a condition to perform his agreement.

Cur. adv. vult.

(*a*) 5 Barn. & Adol. 58.

Lord DENMAN, C. J., subsequently in the term (*Jan.* 21), gave judgment. This was an action to recover the amount of a deposit paid on an agreement for the sale of some premises belonging to the defendant. The question arose on the going off of the bargain. A part of the bargain was unexecuted by the non-delivery of a certain part of the premises,—small cottages in the possession of some persons, tenants of the defendant. It was alleged in the defence, that this non-delivery took place with the consent of the plaintiff. Issue was taken upon that allegation. It appeared that the plaintiff, or at least his agent, was informed at the time of the bargain, that these persons were in possession of the premises, and that his agent said that he would tell the plaintiff, but from that time till the day fixed for the performance of the agreement the plaintiff did not say one word about the cottages being delivered up. At a late hour on that day, near the hour of midnight, after other matters relating to the execution of the agreement had been settled, the plaintiff required that possession of these premises should be delivered up. It was objected on the part of the defendant, that the plaintiff by his conduct had waived the right at that time of requiring the cottages to be delivered up; and that he must be considered to be in possession of the cottages by means of the persons as his tenants. One question was, whether there was evidence in support of this case to be left to the jury. We are of opinion that there was. Another question was, whether, upon the authority of *Goss* v. *Lord Nugent*, the agreement to excuse the defendant from the performance of this part of the contract ought to be in writing. That question was not raised at the trial. We give no opinion on that point, as we do not think that the case falls within that of *Goss* v. *Lord Nugent*. The meaning of giving up possession in this case, was by turning over the tenants, not by giving actual possession of the premises. There will, therefore, be no rule.

Rule refused.

The KING *v.* WARD.

Indictment for a nuisance in a navigable river and port, by erecting a pier, which was an obstruction to the navigation. The jury found that the erection was a nuisance to the navigation, but that the inconvenience occasioned by it was more than counterbalanced by the advantages of it given to the public:—*Held*, that the indictment was maintainable, and that the verdict must be entered for the Crown.

INDICTMENT for a nuisance in erecting a pier in that part of the *Medina River*, which forms a portion of *Cowes Harbour*. The case was tried before Lord *Denman*, C. J., at the *Hampshire* Summer Assizes in 1834. It appeared that the pier had been originally erected by the father of the defendant, that its then length was 70 feet, that the defendant had added 12 feet—that the line of mooring for vessels was outside the place where the pier was erected—that from the end of the pier to the line of mooring there was a distance of 150 yards—and that the channel of the river was outside the line of mooring. For the prosecution, it was contended that the pier was an impediment to trading vessels and to row boats; and also to lighters that had occasion to punt up close to the shore, and to vessels warping up the river. For the defence it was said, that in stormy weather the preventive service boats could be more easily launched from the pier, and that small boats could be protected by it from storms; and that visitors in steam-boats to the island, could more easily land at, and embark from the pier. The defendant had warned trespassers off the pier, and had refused to allow pigs and potatoes to be landed there. The learned judge left the following questions to the

jury:—1. Whether it was a nuisance to the navigation of the river. 2. Whether the public were benefited by the improvement in the facilities for landing and embarking passengers and goods. 3. Whether the public were benefited by the shelter it afforded in the launching of small boats. 4. Whether the advantage thus obtained in any or all of these respects, was greater than the inconvenience occasioned by the erection of the pier. The jury found that the addition to the pier was a nuisance to the navigation, but that the inconvenience occasioned by it was more than counterbalanced by the advantages of it given to the public. Upon this finding a verdict of guilty was entered, with leave to move to enter a verdict of not guilty. A rule had since been obtained to set aside the verdict, and enter the verdict for the defendant, or for a new trial.

Erle and *Sewell* showed cause. The advantages said to be secured to the public are doubtful; but even if they exist, they are only of a temporary nature, whilst the evil of the erection of the pier is permanent. One of the supposed advantages is, that people may more conveniently land from, and embark in, the steam-boats. But it is not clear that the public may do this as a matter of right; and if as a matter of favour only, it is not a public advantage which may be set off against the nuisance. There is no proof that there has been a dedication of the pier to the public. Again, there is no evidence that the freehold of the spot where the pier is erected is in the defendant, so that, even if he had dedicated the pier to the public, no permanent right to it may have been acquired by them. The finding of the jury amounts to this—that the defendant has done an act which is in itself a nuisance, and which is not in the exercise of any public right. He has, therefore, no right to contend that advantages distant in point of place and time may be taken into calculation, and be set off against his immediate and direct act of nuisance. There is no resemblance between this case and that of *Rex* v. *Russell* (*a*). The authority chiefly to be relied on is to be found in *Hale, De Portibus Maris* (*b*), where it is said, "the straightening of the port by buildings too far projecting into the water, where ships or vessels might formerly have ridden," is a nuisance. The question of nuisance or no nuisance is a question of fact, and here that fact has been found for the Crown. Lord *Hale*, indeed, also says (*c*), "It is not every building below the high water mark, nor every building below the low water mark, that is *ipso facto* a nuisance." But then it is always a question for the jury; and in the present instance the jury have expressly found that a nuisance exists. The question of set-off of advantage against disadvantage can never arise, for the thing must be shown distinctly to be a nuisance; and if it is so shown, the existence of some advantages possibly derivable from it will not make it cease to be a nuisance. In the case of *Rex* v. *Lord Grosvenor* (*d*), the balance of advantage and disadvantage was relied on; but Lord *Tenterden* did not leave it in that way to the jury, but said, "The question is, whether, if this wharf be suffered to remain, the public convenience will suffer." The case of *Rex* v. *Russell* was the first where a justification of this sort was contended for; but even there the public advantage was more directly consulted than in the

(*a*) 6 Barn. & Cress. 566.
(*b*) Pt. 2, c. 7, p. 85.
(*c*) *Id.*
(*d*) 2 Stark. 511.

present case: and it was distinctly proved that the staiths erected in the river must produce the advantage of giving to the public an article of necessary consumption in a cheaper and better state than before. In that case, however, Lord *Tenterden* expressed himself distinctly opposed to the principle which is contended for in this case. In *Rex* v. *Pease* (*a*), it was in substance held that a balance of advantage was no answer at common law to an indictment for a nuisance, though it might have been the ground of a statutory provision on the subject. *Hind* v. *Mansfield* (*b*) shows that, without a legal sanction first given, no public right can be infringed, even though some benefit may accrue from the change. *Rex* v. *Warde and Lyme* (*c*) went on the same principle; so does *Rex* v. *Morris* (*d*). All are opposed to the doctrine of the majority of the judges in *Rex* v. *Russell.*

Sir *W. Follett* and *Bere*, in support of the rule.—The finding of the jury does not give rise to any of the questions stated on the other side. This is not a pier erected by the defendant. Only a portion of it was added by him to one that was already in existence. The finding of the jury is in substance, that this erection would be a nuisance, but that it is an advantage. That is virtually a finding for the defendant. The question is not whether a person who impedes the navigation of a river may show that the disadvantage thereby occasioned is counterbalanced by the benefit secured; but whether a person may or may not make an erection in a port which is of benefit to that port. If the public receive a benefit from the erection it is not a nuisance. There is no conflict of authorities here. The law clearly is, that erections in ports may be made where navigation has before been carried on; and that an erection may be below high water mark,—and, consequently, in a place where ships have been accustomed to sail,—and still it will not be a nuisance. The breakwater at *Plymouth* in itself obstructs the navigation, but as it is of benefit to the public, it is not a nuisance. It may be said that the breakwater was made under the authority of an Act of Parliament; but that is not an answer. Mr. Justice *Holroyd* (*e*) says, in *Rex* v. *Russell:* "Independently of these statutes, there are public and private rights with regard to the port, for traffic and commerce in coals, and also other merchandise. There is a public right of navigation on the river for that and other purposes. There are also public and private rights of fishing on the shore. For traffic there are rights not only of navigation, *eundo et redeundo*, but *morando*, (so far as necessary or reasonable,) for loading or unloading, or for a wind, &c. The enjoyment of each of those rights by some is frequently and necessarily an obstruction to the free and complete enjoyment either of the same right or of some other of the above rights in others, *ex. gr.* ships at anchor in the channel of the river are an obstruction to ships sailing, &c., boats and wherries plying. Keels lying in the river are also an obstruction. But such obstruction is not necessarily, nor as a matter of law, a public or a private nuisance. Each of the rights above-mentioned must at times occasionally yield and become subordinate, as may be necessary or reasonable, at least in part, to some of the others. The public (that is, each individual,) has not an absolute right to navigate (*i. e.* sail over) every part of the river, but only

(*a*) 4 Barn. & Adol. 30.
(*b*) Noy, 103.
(*c*) Cro. Car. 266.
(*d*) 1 Barn. & Adol. 441.
(*e*) 6 Barn. & Cress. 586.

where there is not a legal pre-occupation (as in some cases there may be) by others. Ships, in order to load, must lie, if not at the staiths, in the channel of the river with their loading keels. So, in other trades, the ships lie at the wharfs or elsewhere, in the river or port, to load or unload; and their obstructions to others is or is not, as well as the erection of the wharf itself, a nuisance to the navigation, in like manner as the staiths or geers themselves in the coal trade are or are not a nuisance, according to circumstances. Whether they are so or not is dependent upon circumstances, and is therefore, according to Lord *Hale*, a question of fact for the jury. After specifying as a nuisance "the straitening of the port by building too far into the water where ships or vessels might have formerly ridden," he adds, "it is to be observed that nuisance or not nuisance in such a case is a question of fact. It is not, therefore, every building below the high water mark, nor every building below the low water mark, that is *ipso facto* in law a nuisance." To hold the reverse of this opinion would amount to saying, that if a man builds any thing in the line of navigation of a river, no matter what benefit is derived from it, such a building must be a nuisance. No person can contend for such a doctrine. Every obstruction on a public way is not necessarily a nuisance; as for instance, the hoards put before houses during their repair. Yet hoards obstruct the way of the passengers. The effect of the passage in *Hale* is, that there may be an impediment to a navigation without its being a nuisance. *Rex* v. *Grosvenor* (*a*), in effect, decided the same thing, and does not in the least interfere with the case of *Rex* v. *Russell*. That case was expressly recognized in the judgment of this Court in *Rex* v. *Pease* (*b*), where it is also said, "Can any one say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit of another." If the advantages derived here are in any degree temporary, so are the disadvantages, the punting up of vessels in shore being never done but at the ebb tide. A port is a haven for ships and other vessels, and not merely an open space of water, but has something artificial in it, as wharfs, warehouses, &c. (*c*). It is, in fact, something where other conveniences besides those of mere passage are required, and the erection of buildings which improve those conveniences is not a nuisance, but a benefit: it may be considered as carrying out into full operation the great object of a port. The defendant who has done this is entitled to an acquittal.

Lord DENMAN, C. J.—My understanding at the trial was, that the question was much the same as in *Rex* v. *Russell*. That case has since been doubted, and certainly requires examination. In that case, in which Lord *Tenterden* differed from Mr. Justice *Bayley*, it appears to me that Mr. Justice *Holroyd* did not adopt the sentiments of the latter judge, so that the two judges who thought that there ought not to be a new trial, were almost as much opposed to each other as Lord *Tenterden* was to Mr. Justice *Bayley*. If the violation of any right is to be vindicated by advantages possibly created to other parties, the question of nuisance or no nuisance will be entirely one for the decision of a jury; and the rules of law applicable to that question will be completely got rid of, and in their stead will be introduced specula-

(*a*) 2 Starkie, 511.
(*b*) 4 Barn. & Adol. 42.
(*c*) Hale, De Portibus, c. 2, p. 46.

tions of a vague and unsatisfactory nature. It is here contended for the defendant, that there is a clear distinction between a right of passage over a navigable river and the right of using a port. That is open to him to contend, if, after what has taken place at the trial, it can be doubted of. But we wish to consider the circumstances of the case, and see whether there should be a verdict of guilty or not guilty entered, or whether the opinion of the jury should again be taken, but on the matter differently presented to them.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (*a*), (12th *January*), delivered judgment. This was an indictment for obstructing a certain part of the river *Medina* (a navigable river and public highway), called *Cowes Harbour*, by erecting and continuing an embankment in the stream and waterway.

The subject of indictment was a causeway projecting into the water, and raised on a kind of platform. The causeway originally was of gravel, shingle, and stone, called "a hard," and went sloping down to the water. The defendant's father had sued out a writ of *ad quod damnum*, under which the proceedings were regularly conducted to their close, when he removed the causeway, and made a new one along the water's edge, considerably to the south.

In 1833 this new causeway or wharf was considerably lengthened in the same direction, which was inwards up the harbour. It was also then first raised on piles, and much heightened; and instead of sloping down, it is now at the extremity five feet four inches higher than the shore.

The indictment was preferred by the corporation of *Newport*, on the complaint of the harbour-master and water-bailiff, who are sworn to prevent nuisances in the harbour. The case which the prosecutors sought to establish may be taken from the following passage, which I copy from my note of the harbour-master's evidence: "The causeway is decidedly an inconvenience to the navigation. Small vessels of 26 or 28 tons are much obstructed in their tacking, when making their way up to *Newport* with the tide. They were in the habit of using a setting pole, which this prevents, and sends them out of the best of the water." He described, also, some inconvenience to which square-rigged vessels, lightermen, and row-boats were exposed, in consequence of the present state of the causeway, both as to navigation and landing. Many witnesses were called in support of these allegations.

On the defendant's part, some witnesses denied the existence of these inconveniences altogether; others represented them as very trifling. But he mainly placed his defence on the advantages obtained by the public from the general result of the alteration—which was thus described by the captain of a steam-boat: "I consider the alteration a great benefit to the public,—1st, in launching and landing boats more readily; 2dly, steam-boats (and, of course, other vessels,) can approach where they could not; 3dly, vessels obtain shelter from the quay." And these results were hardly disputed on the part of the prosecution. The learned counsel for the defendant cited *Rex* v. *Russell*, and *Hale*, *De Portibus Maris*. In summing up the evidence, after a long trial, I asked the jury to state their opinion, whether the cause-

(*a*) This case was argued in *Michaelmas* Term.

way, in its altered state, was a nuisance to the navigation, and whether the public benefit was greater than the inconvenience. The jury, after deliberation, stated that an *impediment* had been created; but I declined to receive that expression, as not necessarily equivalent to the word *nuisance*, as an impediment might be too trifling in degree to be properly called a nuisance. They said, at length, that they considered it to be a nuisance; but they added, both at first and at last, that the inconvenience was counterbalanced by the public benefit arising from the alteration made by the defendant.

I had thought that this, which is a special verdict, was intended to be laid before a Court of Error immediately; but Sir *Wm. Follett* obtained a rule of this Court for entering a verdict of not guilty, on the ground that the finding amounts to an acquittal. And this conclusion would probably be found irresistible, if the case of *Rex* v. *Russell* was well decided by the majority of this Court: or rather, if the direction of the learned judge who tried that indictment correctly laid down the law. That learned judge concluded his address to the jury in these terms:—"If you think this is not placed in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit arising from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown. If, on these points, you are of a different opinion, then for the defendants." In substance, therefore, it should seem that the jury were directed to find the defendant not guilty, if his act, indicted as a nuisance, were productive of more public benefit than public inconvenience. The greatest weight is due to the authority of *Bayley*, J., who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent judge to *Holroyd*, J., who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing up; on the contrary, he plainly considers the topic to have been introduced as an answer to some observation invidiously made to the defendant's prejudice by the counsel who conducted the prosecution, and thinks that it must be qualified, throughout the summing up, and even to its close, by its connection with that argument. *Bayley*, J., himself, who delivered his judgment after *Holroyd*, J., takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former, the advantages that may be derived from the change by *any part* of the public. He takes for an example the purchasers of coals, sent from the indicted staith to a distant market. Lord *Tenterden* thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, "Whether the navigation and passage of vessels over this public navigable river were injured by these erections." Lord *Tenterden's* dissent must be allowed to detract greatly from the authority to be ascribed to the direction given at *Nisi Prius*, which his lordship was evidently anxious to sustain, if possible; and when it appears that *Holroyd*, J., founds his support of the direction on a distinction which excludes the general principle now contended for and avowed by *Bayley*, J., the case of *Rex* v. *Russell* will appear to rest on the single authority of that learned judge acting at *Nisi Prius*, and satisfied, on reflection, with the course which he had then taken. It is

observable, also, that of the distinguished counsel who opposed the rule for a new trial in *Rex* v. *Russell*, and of those who have addressed us on the present occasion, none have maintained that the direction there given was altogether conformable to law. If indeed it were, we might well feel some surprise that the doctrine should appear there for the first time. Certainly no trace of it has been discovered in any law book of an early date; but the cases quoted from Cro. Car. 266 (*Rex* v. *Warde and Lyme*), and Salkeld, 12 (*Payne* v. *Partridge*), display a strong repugnance to it. The first glimpse of it is detected in some expressions employed by Lord *Tenterden* in *Rex* v. *Lord Grosvenor*. His lordship there lays down, "that the public have a right to all the convenience which the former state of the river afforded, *unless by the change some greater degree of convenience is rendered.* Vessels are entitled to the advantage of shelter, unless the want of it is compensated by some superior advantage resulting from the alteration." Hence it is inferred, that if the public *had* derived any new convenience from the change, which a jury should think greater than that which the nuisance took from them, or if some advantage superior to that of shelter had resulted from the destruction of that shelter, his lordship would have directed an acquittal. But this by no means follows; for all who have studied the course adopted by that learned and cautious judge, are well aware that his habit never was to lay down a larger proposition of law than the case in hand required. It is evident that, in *Lord Grosvenor's* case (which was that of an embankment raised by an individual for his own profit), the only question which he thought necessary to be submitted to the jury, viz. whether the public had benefited by the alteration made, was plainly confined to such benefits as the public might have derived from it in the exercise of that very right, the invasion of which was treated as a nuisance. If he had contemplated the doctrine of *Rex* v. *Russell*, he would have told the jury to consider whether that part of the public which consisted of the frequenters of the wharf, had not gained more than the navigating part of the public had lost by means of the erection made. But, even if the language employed had comprehended in its terms all possible modes of compensation, Lord *Tenterden's* judgment in *Rex* v. *Russell* plainly shows what his deliberate view of the law was, and that the advantage gained ought to be closely connected with the inconvenience resulting, or rather with that which would have been an inconvenience if it had not been *absorbed* in the superior advantage. This is most apparent from what is ascribed to him in p. 602. In this view of the law my brother *Littledale* authorizes me to say that he fully agrees, though his connection, when at the bar, with the case of *Rex* v. *Russell* induced him to take no part in that decision. And in the infinite variety of active operations always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights from motives of personal interest, on the speculation that the changes may be rendered lawful, by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle; for daily experience proves, that great acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of compensation to any portion of the public which may suffer for their advantage. In the recent argument the doctrine of compensation for

King's Bench.

The KING v. WARD.

nuisance was supported by one analogy only. Mr. *Bere*, comparing the right of navigation over a waterway to that of walking along the street, observed that the latter was sometimes interrupted by the exercise of other rights, as when a *hoard* is erected for repairing a house. But it rather appears that the hoard is placed for the safety of those possessing the right of way: if it leaves them a free passage, it protects them from inevitable danger, and it sends them another way, if the whole street is necessarily obstructed. Every highway to which houses adjoin must be considered as set out subject to those occasional interruptions—which resemble the temporary acts of loading coals in keels, alluded to in *Rex* v. *Russell*. A *permanent* hoard would be abatable as a nuisance, much resembling the staith in *Rex* v. *Russell;* the wharf in *Lord Grosvenor's* case; and the quay for which this indictment was preferred. But the learned counsel contended that they did not want the authority of *Rex* v. *Russell*, and could establish their right to a verdict of not guilty on the finding of the jury, from a consideration of the nature of the place where the nuisance is charged. They say that the *River Medina*, as described in the indictment, is not merely a navigable river, but a port—*Cowes' Harbour*—and they rely on the various rights that may exist together in such a place, and their unavoidable inconsistency at particular times. The same remark may, however, be true with respect to a highway, where right of common of pasture and right of common of turbary may exist at the same time. It is still more strikingly true in respect of navigable rivers, from which it seems impossible to distinguish the case of ports in principle, though the degree may perhaps be different. Where such rights happen to clash in questions brought before the Courts, the valuable maxim, "*Sic utere tuo ut alienum non lædas*," will generally serve as a clue to the labyrinth.

But the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a *new right* to the prejudice of an old one. There is no legal principle to justify this proceeding unless *Rex* v. *Russell* be well decided. Recourse is then had to the great and venerable name of *Hale*, from whose excellent treatise, *De Portibus Maris*, some such words as the following may be extracted: "It is not every building below the high water mark that is, *ipso facto*, in law a nuisance: for that would destroy all the quays that are in all the ports of England, for they are built below the high water mark, for otherwise vessels could not come at them to unload; and some are built below the low water mark; and it would be impossible for the king to license the building of a new wharf or quay—whereof there are a thousand instances—if, *ipso facto*, it were a common nuisance. Nay, in many cases, it is an advantage to a port to keep in the sea water from diffusing at large; and the waters may flow in shallows, where it is impossible for vessels to ride." But *Hale*, in this passage, is only disputing the doctrine, "that every building below the low water mark is, *ipso facto*, at law a nuisance, which his observations on existing quays, and on such as may have been created under the king's licence, effectually disproves; and the argument is strengthened by the fact, that in some cases such buildings are essential to the harbours being navigated at all. Here is no question of balancing nuisances, nor was the position intended to affect the general rule laid down by the same great authority at p. 9 of the same treatise, that "all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment." There is no incon-

gruity in his afterwards asserting that the question of nuisance or no nuisance is for the jury. So Lord *Tenterden* considered it in *Rex* v. *Russell*, and he gave the form in which he thought it ought to be submitted to them; and that is precisely the course taken on the trial of this indictment. The jury, having answered my inquiry in the affirmative, have plainly found a verdict for the Crown, unless their added statement entitled the defendant to an acquittal. For the reasons given we think it did not, and that the present rule must therefore be discharged.

Rule discharged.

DOD *v.* GRANT.

DEMURRER to a declaration, which commenced by alleging the defendant to be in the custody of the Marshal of the *Marshalsea*. Special causes—That in the beginning of the declaration, the plaintiff has not followed the rules (*a*) prescribed by the Court, for it is not stated therein that the defendant has been summoned to answer the plaintiff, or that he has been arrested, or that he is detained in custody at the suit of the plaintiff; and that the commencement is in the same form as used before the Uniformity of Process Act (*b*).

1. It is no cause of demurrer to commence a declaration with the old statement—that the defendant is in the custody of the Marshal.

2. Such a mode of declaring is the proper form when the action was commenced in an inferior Court, and has been removed; because the Uniformity of Process Act, and Rules made on it, do not apply to such a case.

3. If such a mode of declaring be adopted in an action which was not commenced in an inferior Court, although the declaration would not be demurable, it would be good ground for moving to set it aside for irregularity.

J. Jervis, in support of the demurrer. This declaration is bad, under the provisions of the 2 *Will.* 4, c. 39, and under the authority of the new rules. Formerly when a prisoner was in custody of the officer of any one Court, if it was required to bring an action against him in another Court, the party was obliged to sue out a *habeas corpus*, and there was a temporary change of custody. But that is no longer necessary. The eighth section of the statute (*c*) has provided a different mode of proceeding. The new rules of *Michaelmas* Term, 3 *Will.* 4, have been framed upon the provisions of that statute. Two cases, *Barnett* v. *Harris* (*d*), and *Millard* v. *Milman* (*e*), have been decided upon the construction of that statute, and show that the former alteration of custody is no longer necessary. By s. 15 of the Rules of *Michaelmas* Term, 3 *Will.* 4, the following form is provided for cases where the defendant is already in custody, and is ordered to be followed:—"The plaintiff &c. complains of the defendant being detained at the suit of the plaintiff in the custody of the Sheriff, [*or* the Marshal of the *Marshalsea* of the Court of *King's Bench*, *or* the Warden of the *Fleet*."]—The present declara-

(*a*) Reg. Gen. M. T. 3 *Will.* 4.

(*b*) 2 *Will.* 4, c. 39.

(*c*) 2 *Will.* 4, c. 39, by which it is enacted, "That where it shall be intended to detain in any such action, any person being in the custody of the Marshal of the *Marshalsea* of the Court of *King's Bench*, *or* of the Warden of the *Fleet* prison, the process of detainer shall be according to the form of the writ of detainer contained in the schedule of the Act, and marked No. 5., and a copy of such process and of all indorsements thereon, shall be delivered, together with such process, to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said Courts, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be, and the proceedings shall be as against prisoners in the custody of the Sheriff, unless otherwise ordered by some rules to be made by the Judges of the said Courts."

(*d*) 2 Dowl. P. C. 186.

(*e*) *Ibid.* 723.

tion is not in that form, and is therefore bad. [*Littledale, J.*—Should you not have moved to set it aside for irregularity?] No, it is more than a mere irregularity. The plaintiff must show that the Court has jurisdiction, which he has not done in the present case: the declaration is therefore bad.

Ball, contrà.—If this cause was commenced in an inferior Court, and removed by *habeas corpus*, neither the statute nor the new rules apply to the case. As, therefore, this declaration might be good under particular circumstances, the Court will not infer that this is not a case of that particular description. If so, then there is no objection on demurrer. Besides, if there be any objection, it is ground for a motion to set aside for irregularity, and not of demurrer. *Thompson* v. *Dicas* (*a*), *Harper* v. *Chumneys* (*b*).

J. Jervis in reply.

Lord DENMAN, C. J.—This declaration may be either good or bad, according to circumstances. If the action was originally commenced in an inferior Court it would be good; but it is said that we ought not to presume that the action was so commenced. As we must assume one of the two things, why are we to presume that the action was not commenced in an inferior Court, when, by so doing, we shall decide that the declaration is wrong, and shall in effect oust the Court of jurisdiction; when, possibly, circumstances may exist under which the declaration is perfectly right? It is said, that if this was so, it would be in effect repealing the Statute for Uniformity of Process. If that is so, it is the fault of the defendant himself. It is not disputed that, if the fact be that the action was not commenced in an inferior Court, this would be the proper subject of an application to the Court to set aside the declaration for irregularity. There may be cases in which this form would be perfectly right, and as there is nothing to show us that the present is one of those cases, I think that we ought not to allow the demurrer.

LITTLEDALE, J.—For any thing that is now shown to us, this may be one of the cases in which the form used would be regular. This being the regular form before the Uniformity of Process Act, let us see what alteration has been effected by that Statute. That Act was not to apply to cases which were removed from inferior Courts into this Court. The New Rules suppose that the man is in custody. If this action had been commenced, in the first instance, by process in this Court, the form used would be irregular. We are told that nothing is stated here to show that we have jurisdiction, and we are asked to put this case within the exceptions established by the New Rules. I do not see that we are bound to do that. If the case is shown to us to be within those rules, we will apply them; but it must be shown to be so. If there were one hundred cases, and the Statute had said that ninety-nine of these should be treated differently from what they had been at common law, and but one case was left as at common law, should we be bound to say, in any case that occurred afterwards, that it did not fall within the one remaining class of cases? In *Comyns' Digest* (*c*) the general

(*a*) 1 Cromp. & Mees. 768. (*b*) 2 Dowl. P. C. 680. (*c*) Pleader, C. A. 8.

rule is laid down: that has been altered by the Act in some cases, but not in all, and this is one of the latter. I think that there is no ground for the demurrer in this case. It may be an irregularity.

WILLIAMS, J.—I am of the same opinion. This may be a mere irregularity. If so, it would have been available for the defendant on a proper application. There is no reason for saying that we must presume that this action was originally commenced here, and not brought here from another Court. It is said that there ought to be on the face of the record a statement that it was commenced elsewhere, and then removed here. I am not of that opinion. It is then said that there is no one form in the schedule that applies to the present case. I answer, for the best of all possible reasons, namely, that there is nothing here which requires any one particular form.

Judgment for the plaintiff.

The KING *v.* BOULTBEE.

ON 24th *January*, 1834, *Richard Pickering* was convicted, under 1 & 2 *Will.* 4, c. 32, by a magistrate of *Warwickshire*, on the information and complaint of the defendant, for that he the said *Richard Pickering* did, on the 18th day of *January* instant, in the year of our Lord 1834, at the parish of *Baxterly*, in the said county of *Warwick*, unlawfully commit a certain trespass, by entering and being in the day time of the same day upon a certain piece or parcel of land in the possession and occupation of *John Rowbotham* there, in search of game with a dog and a gun, contrary to the statute in such case made and provided; and it was adjudged that the said *Richard Pickering* should for the said offence forfeit the sum of 1*l.*, and should pay the said sum, together with the sum of 10*s.* for costs, forthwith. And the magistrate directed that the said sum of 1*l.*, being the amount of the said penalty, should be paid to *John Breadon*, one of the overseers of the poor of the said parish in which the said offence was committed, to be by him applied according to the directions of the statute in such case made and provided; and ordered that the sum of 10*s.* for costs should be paid to the said defendant. *Pickering* gave notice of his intention to appeal against the conviction. The notice stated several grounds of appeal, all of which were matters of substance, and concluded with a notice that the appellant would on the trial of the appeal insist upon all other causes, matters and things which he could or lawfully might do. At the Quarter Sessions for *Warwick* in *March*, the appeal was heard, and the conviction was quashed for want of form (*a*), and the defendant was ordered to pay the sum of 14*l.* 11*s.* 8*d.* to *Pickering* for the costs. The want of form alleged was, that the conviction did not adjudge that *Pickering* should be imprisoned, or imprisoned and kept

1. In the 1 & 2 *W.* 4, c. 32, s. 45, (the Game Act), is a general enactment that no summary conviction in pursuance of the act shall be removed by *certiorari*:—*Held*, that a writ of *certiorari* might nevertheless be issued at the instance of a private prosecutor.

2. By that statute an appeal is given to the sessions against any conviction under it, to any person aggrieved by such conviction, provided he give to the complainant within a certain time a notice in writing of such appeal and of the cause and nature thereof:—*Held*, that the sessions had no power to adjudicate on a matter not stated in the notice; and that they could not therefore quash a conviction for want of form, after a notice of appeal which only stated grounds of objection on the merits.

(*a*) By the statute no conviction is to be quashed for want of form merely.

King's Bench.
THE KING v. BOULTBEE.

to hard labour till the penalty was paid, according to the form of the conviction, as given in the statute 1 & 2 *Will.* 4, c. 32. The conviction was removed into this Court by writ of *certiorari*, obtained at the instance of the defendant. A rule had been obtained by *Pickering*, calling on the defendant to show cause why the writ of *certiorari* should not be quashed *quia improvidè emanavit:* and a rule had also been obtained by the defendant, calling on *Pickering* to show cause why the order of sessions should not be quashed. Both rules came on for argument together.

Hill and *Kelly*, for *Pickering*.—They contended that as the *certiorari* was taken away in express terms by the 45th section of the statute 1 & 2 *Will.* 4, c. 32, it was taken away in this case: because, although it has been held that the Crown is not bound by a clause of this sort, yet that only applies to cases where the Crown itself is directly interested, and not to cases where the prosecutor is a private individual. They cited in support of this position *Rex* v. *Allen* (*a*). They also submitted on this point, that all the cases in which a private person had been held to be entitled to a writ of *certiorari*, were cases in which that person was the prosecutor, and sought to enforce the conviction: whereas in the present instance *Boultbee* is the defendant, and he seeks to quash the conviction. They contended that the omission of an adjudication of imprisonment was a matter of substance, for which the conviction ought to be quashed; and that the statement that the Sessions had quashed the conviction for want of form would not prevent the Court from supporting the order of sessions.

Bere and *Daniel*, for *Boultbee*.—They argued that there is no such distinction as that contended for, between a case where a prosecution is instituted by the Crown directly, and one in which it is instituted by a private individual. They cited, as cases in which the writ of *certiorari* had been granted where a private individual was the prosecutor, *Rex* v. *Bodenham* (*b*), *Rex* v. *Farewell* (*c*), *Rex* v. *Cumberland*, (*d*) and *Rex* v. *Davies* (*e*); they also contended that in *Rex* v. *Allen* no such distinction was recognized; and referred to the language of *Bayley*, J., in giving judgment in that case, to support that view. On the point as to the jurisdiction of the Sessions to quash the conviction for want of form, on a ground not pointed out in the notice of appeal, they contended that the Sessions had exceeded their jurisdiction, at all events, because if the defect were matter of form—then by the statute no conviction is to be quashed for want of form; and if it were matter of substance—then, as it was not mentioned in the notice of appeal, it was not a subject over which the Sessions had any jurisdiction.

Lord DENMAN, C. J.—In this case there are two rules before the Court, one to quash a *certiorari* issued by this Court to the Quarter Sessions of *Warwick*, and the other to quash an order made at those Sessions, upon the complaint of a person named *Pickering*, who had been convicted of an offence against the Game Laws. The conviction against *Pickering* took place under

(*a*) 15 East, 333.
(*b*) Cowp. 78.
(*c*) 2 Stra. 1209; 1 East, 305, n.
(*d*) 6 Term Rep. 194.
(*e*) 5 Term Rep. 626.

the 1 & 2 *Will.* 4, c. 32; and on that statute he had a right reserved to him of an appeal to the Sessions, which right he was to exercise according to the conditions therein imposed. One of those conditions is, that notice in writing of such appeal, and of the cause and matter thereof, be given to the complainant, within three days after such conviction, and at least seven clear days before such Sessions; and it is then enacted, that the Court at such Sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet. The appeal, and the notice which contained the cause and matter of the appeal have been laid before us, and we can see what they are. The notice contained three objections, which all go to the direct merits of the case, for they establish that the party who complained before the magistrate had no right to make such complaint. That being the nature of the notice, it appears to me that this was the matter which the Sessions had to try, and that they ought to have inquired whether the conviction was right, on the ground thus stated. The Sessions did set aside the conviction, and did decide that it was bad; but not on the grounds stated, but merely on a point of form. The conviction itself had not been seen till that time, perhaps it had not been drawn up till the Sessions came on, and it was required to be brought into Court to be for the first time canvassed by the prosecutor and the defendant. The notice had not stated this objection of form to the conviction; the appeal was made upon other and different objections, and then the Justices at Sessions proceeded to try something which was beside the appeal as presented to them; and they decided that the conviction was bad in matter of form. If it is only bad in that respect it is cured by the statute; if not, and if it is bad in substance, then, though the Sessions might have confirmed it, the conviction would not have justified any man in doing any act under it. The Justices at the Sessions have taken upon themselves to do that which they are precluded from doing by the words of the statute—they have tried the conviction, not upon the matter of appeal as contained in the notice, not upon matter of substance, but upon matter of form. If the defect is one of mere form the statute says that it shall not defeat; if the defect be matter of substance, then the conviction will be bad, whether good in form or not. The 45th section is in these terms:—"That no summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of his Majesty's superior Courts of Record." This language would appear to deprive the Crown and the individual of their ordinary rights; but it has been held that this right of the Crown is not taken away, unless the words of the statute are distinctly and plainly directed to such an object. A distinction was attempted in *Rex* v. *Farewell* between cases in which the Crown was the real, and those in which it was only a nominal party; and this distinction was pressed upon the Court in the case of *Rex* v. *Bodenham*; but in that case the Court said:—"In cases of this sort there is no distinction." That case is therefore a direct authority to show that there is no distinction between private cases, and those where the Crown is really the prosecutor. Has that case been overruled? I think not. In *Rex* v. *Allen* the conviction was held removable by *certiorari*. That was a private prosecution; and *Rex* v. *Bodenham* was there quoted without disap-

prohibition. Mr. Justice *Bayley* agreed with it, and said "it was generally that "the Crown as well as the subject had a right to remove the proceeding by *certiorari*, unless that right were taken away. Mr. Justice *Bayley* did not limit the right of the subject, nor did any of the other Judges put a limit upon it: nor was the judgment there founded on any such distinction. I think that there is no such distinction as is supposed between this case and that of *Rex* v. *Allen*. It appears to me that the *certiorari* in this case is not taken away by the Act of Parliament. The Sessions here have done that which they were not entitled to do: and the *certiorari* properly lies to remove the proceeding. The rule for quashing the *certiorari* must be discharged, and the rule for quashing the Order of Sessions must be made absolute.

LITTLEDALE, J., having stated all the circumstances of the case, and read the words of the statute, said:—The direction in the statute being general, the question is whether the prosecutor being a private individual has a right to remove the proceeding by *certiorari*? The general rule is, that the Crown is not bound unless particularly named in a statute. I concur with the rule as laid down in the cases referred to. But it is said that these are cases in which the Attorney-General has made the application, or in which the Crown has a direct interest: but that is not so. It is urged also that the prosecutor here stands for this purpose in the same situation as a defendant, and that in fact it is the defendant here who appears on the face of the rule to be called on to show cause why the *certiorari* should not be quashed. I think however that that is making too refined a distinction. He is the prosecutor of the proceeding below, and so he shall not be debarred from the right he enjoys in that character. The *certiorari* appears to me to have rightly issued, and the proceeding to be proper. What is the other rule? It calls on the Court to quash the Order of Sessions. I think that that rule must be made absolute. The Sessions quashed the conviction for matter of form, not matter of substance. They had no right to do this, nor any right to enter on any other matter than that stated in the notice of appeal. The Sessions, on such a case as was presented to them, had no right to decide on the matter of costs.

WILLIAMS, J.—I am of the same opinion. It seems to me that the *certiorari* was clearly not taken away, and that the distinction which is supposed to arise between this case and that of *Rex* v. *Allen* does not arise at all. That case was decided on the authority of *Rex* v. *Bodenham*. There the distinction now contended for was insisted on, and was by the Court overruled. I think that the Order of Sessions should be quashed. The appeal is of course given by the statute. That which is so given may be restrained by as many forms and conditions as the Legislature may think fit to introduce. But that which has been insisted on in this argument has been expressly taken away by the statute—I mean the objection of form. When the appellant after the conviction gave notice of the matter of the appeal, and stated what that matter was, it was matter of merits. They did not act on this, but proceeded beyond and out of it, and adjudged the conviction bad for want of form. That was wrong. I will only add with respect to this point, that it is certain that if the objection taken to the conviction was of such a nature

(*b*) 15 East, 342.

that the magistrates had no jurisdiction over it, the conviction would not be available. Now if the matter of form had not been relied on here, the conviction would not have been set aside. The magistrates, in entering upon the matter of form, went out of their jurisdiction.

Rule absolute for quashing the order of Justices.
Rule for quashing the *certiorari* discharged.

MORGAN *v.* BROWN and another.

TRESPASS for an assault and false imprisonment. *Plea:* not guilty. At the trial at the *Shropshire* Summer Assizes, in 1834, before *Williams*, J., it appeared that this was an action brought against the defendants, for having, as two magistrates, convicted the plaintiff and *Richard Parker*, under the 9 *Geo.* 4, c. 31, (*a*) in a penalty of 4*s.* and 6*s.* for costs, for an assault committed upon *Elizabeth Yapp*, and having, in consequence of their refusal to pay such sums, committed them to the House of Correction at *Shrewsbury*, for 14 days, unless the money should be sooner paid (*b*). It was contended by the plaintiff, that the conviction was bad on several grounds (*c*), one of which was, that one joint fine was imposed upon two persons. The learned judge was of the same opinion on that point, and a verdict was found for the plaintiff. A rule had been obtained for a new trial in *Michaelmas* Term, 1834.

Where a statute gives a magistrate summary jurisdiction over certain complaints, and authorizes him to fine and imprison a party convicted, he must, if more than one defendant be convicted, impose a separate fine on each, or otherwise the conviction will be bad, and trespass may be maintained against him.

Talfourd, Serjeant, and *C. Phillips*, now showed cause. If the magistrates had jurisdiction, they have exercised it illegally, and the conviction is bad; and the plaintiff is entitled to retain the verdict. The fine here was a gross sum—it ought to have been apportioned between the two persons charged. The justices knew the difference of the guilt of either party, and ought to have imposed a fine accordingly; or if both were equally guilty, the amount

(*a*) By the 27th section of that statute, it is enacted, that "where any person shall unlawfully assault another, it shall be lawful for two justices of the peace, upon complaint of any party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs, if ordered, the sum of £5., and if such fine as shall be awarded by the said justices shall not be paid either immediately after the conviction, or within such period as the justices shall at the time of the conviction appoint, it shall be lawful for them to commit the offender to gaol for any time not exceeding two calendar months, unless such fine and costs be sooner paid."

(*b*) The form of the conviction was as follows: "County of Salop. Be it remembered that on &c., at &c., *Richard Parker* and *Edward Morgan* are convicted before us *Charles Powell* and *John Brown*, Esqrs. two &c., for that they the said *Richard Parker* and *Edward Morgan*, on &c., at the parish of *Hopesay*, in the said county of *Salop*, did violently assault one *Elizabeth Yapp*; we the said justices do therefore adjudge the said *Richard Parker* and *Edward Morgan* for their said offence to forfeit and pay the sum of 4*s.* and also the sum of 6*s.* for costs; and in default of immediate payment of the said sums as aforesaid to be imprisoned in the House of Correction at *Shrewsbury*, for the space of 14 days, unless the said sums shall be sooner paid; and we direct that the said sum of 4*s.* shall be paid to *George Bright*, one of the high constables of the said parish of *Hopesay*, to be by him applied according to the direction of the statute in that case made and provided; and we order that the said sum of 6*s.* for costs shall be paid to the said *Elizabeth Yapp*." The commitment recited the conviction, and directed that in default of immediate payment of "the said sums," the plaintiff and *Parker* should be imprisoned in the House of Correction for the space of 14 days, unless the "said sums" should be sooner paid.

(*c*) Several other points arose at the trial, and were discussed on the motion; but as the judgment is confined to the one above stated, they have been omitted.

King's Bench.
Mellish v. Parsons and another.

of the fine of each ought to have been stated. As the conviction now stands, it is a joint fine, and either party might have been called on to pay the whole amount, by which the other would have escaped without any punishment whatever. Or the conviction might appear to mean that the fine was to be 4*s.* on each of them, so that the amount of the fine is in doubt, and the persons convicted might have been imprisoned in consequence of inability to pay the fine; whereas, if they had known its real amount, they might have been able to pay it at once, and so entitle themselves to be discharged. The conviction is uncertain, and therefore bad.

The *Attorney General* and *Godson*, in support of the rule. It must be taken that each party was to pay half of the fine. [Lord *Denman*, C. J. In *Hawkins* (*a*) referring to 11 *Coke*, it is said, that where there are several defendants, a joint award of one fine against them all is erroneous—it ought to be several against each defendant, for otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs.] The expressions there used apply to a case where there are many defendants—here there were but two, and the proportionable part of each was easily ascertained. In *Rex* v. *Clarke* (*b*), Lord *Mansfield* says, "Where an offence is in its nature single and cannot be severed, there the penalty shall be only single, because, though several persons may join in committing it, it still constitutes but one offence; but where the offence is in its nature several, and every person concerned may be separately guilty of it, then each is separately liable to the penalty."

Lord DENMAN, C. J.—The plaintiff has sued these defendants for having ordered him to be imprisoned and fined. The defendants must justify this imprisonment, as they have attempted to do by the conviction which had taken place before them; and provided that the conviction itself was not bad under the provisions of the statute under which these justices had acted, that justification would be sufficient. Several objections have been taken to this conviction, and I am of opinion that the conviction is bad upon the objection as to the joint fine. It is only necessary to refer to this one objection to decide the case. The only thing that can be said for the conviction is, that it is obscure. But upon that ground I think it would be bad. It does not state exactly what is the amount of the penalty decreed against the plaintiff. A man has a right to know exactly for what sum he can obtain his release from prison, in order that he may make the payment and be discharged. In point of fact, the offence with which the plaintiff was here charged, was in its nature and circumstances a separate and not a joint offence. It must therefore be separate in the nature of its punishment, for the term of imprisonment and the amount of the fine are in the discretion of the magistrates; and the fine imposed, should be such as results from the exercise of that discretion. One of the parties might have a fine of 4*s.* imposed upon him, and the other might be nearly innocent of the offence, and not deserve to have any fine whatever inflicted upon him; and yet if a joint fine might be imposed, the comparatively innocent man might be compelled to remain in prison till the other paid the fine. It was upon the principle that such an injustice might be the result of a joint fine, that *Hawkins*, in his Pleas of the Crown, has said,

(*a*) 2 Hawk. P. C. c. 48, s. 18. (*b*) Cowp. 610.

that joint fines can not be permitted. The rule to set aside the verdict for the plaintiff must be discharged.

LITTLEDALE, J.—I think, as a general rule, that it must appear distinctly in all proceedings, civil as well as criminal, whether they are joint or several. Miss *Yapp* might have indicted the plaintiff and his companion jointly or separately, or might have had a joint or separate action against them. She chose to proceed criminally against them, under 9 *Geo.* 4, c. 31. These persons were therefore brought before the magistrates, who considered the case, and it appeared to them that a fine of 4*s.* ought to be paid. It is not quite certain whether they meant that each should pay 4*s.* or that the fine should be divided between the two persons, but they directed that, till the fine was paid, they should be imprisoned. I take it on the whole, that there should be but one fine of 4*s.* paid. Then the question arises, whether in a proceeding against two persons a joint judgment can be given, that there should be paid one fine. In this Court, under such circumstances, a fine is always imposed on each defendant. It may be 20*s.* on one, 20*l.* on another, and 100*l.* on a third, for the case of each is considered separately, with a view to see what each ought to pay. The proceeding in this case was in effect of a criminal nature. The officer of this Court does not know of a fine being joint when there were two or more persons convicted of an assault. The authority upon the point is that which my Lord cited from *Hawkins*, which refers to the 11 *Coke's Reports* (*a*). That was the case of a fine upon the jurors of a court leet, and it was "unanimously resolved, that the fine imposed upon the jurors jointly was not lawfully imposed, but ought to have been assessed upon them severally." The reason of the thing, and the constant practice of the Court, show, that the fine ought to have been several, for there may be different degrees of criminality in different defendants; but here the fine was imposed upon both, which might have the effect of imprisoning one for the offence, as was argued in *Godfrey's* case. I think that the conviction is therefore bad, and that the rule for setting aside the verdict must be discharged.

WILLIAMS, J.—This is a matter affecting the jurisdiction of the magistrates. If we must consider that this is meant to be a fine of 4*s.* for both, it follows, that if either of them paid 2*s.* and his share of the costs, if any, he ought to be discharged. But according to the form of this conviction, he would be further liable to be retained till the whole amount was paid. This does affect the merits of the case, and the quantity of the imprisonment, and I agree with the rest of the Court, that the conviction is bad. I did not think it right at the trial to stop the defence, but I referred to other topics connected with the case, and recommended, that if the jury found for the plaintiff, they should give temperate damages—a recommendation which they have adopted.

Rule discharged.

(*a*) *Godfrey's* case, 11 Co. 42.

King's Bench.

JOHNSON *v.* The Churchwardens and Overseers of ST. PETER, HEREFORD.

Covenant by churchwardens and overseers, who are lessees for years of premises, to keep them in good and tenantable repair, and at the end of the term leave the same in such good and tenantable repair, together with all buildings erected upon the premises: a further covenant not to convert the premises to a particular specified purpose, but, on the contrary, keep the same for such purposes as they might think proper, provided the premises were left at the end of the term in the state and condition they were in at that time. After the expiration of the lease, succeeding parish officers held over, without any new agreement:—*Held*, that there was no implied promise to yield up the premises at the expiration of the tenancy which existed after the determination of the lease, in the state in which they were when the original lease was granted.

ASSUMPSIT, on a consideration that the defendants had become and were tenants to the plaintiff of certain premises which had before then consisted of two separate messuages, but which had been altered and converted into a workhouse, and which then remained so altered and converted, upon the terms (amongst others) that the defendants should, during the tenancy, at their own cost, keep the premises in good and tenantable repair, and at the expiration of the tenancy re-alter and re-convert the workhouse into two separate messuages, and restore the premises to the state and condition in which they were previously to such alteration and conversion, and deliver up the same to the plaintiff so re-altered, re-converted and restored, and in such good and tenantable repair, together with all buildings which might be erected thereon. Alleging a promise to perform the terms; and a breach. *Plea, non assumpsit.* At the trial before *Alderson*, B., at the *Herefordshire* Summer Assizes, 1834, a verdict was found for the plaintiff, with the damages laid in the declaration, subject to the award of a Barrister, who was to direct for what amount the verdict should stand, or whether it should be set aside, and a verdict be entered for the defendants, and to state in his award any question of law which he might be requested to raise, either as to the right of the plaintiff to recover, or as to the principle on which the damages, if any, were to be settled. An award was made, which stated, that by indenture of lease, dated 15th *December*, 1807, *Hencourt Woakes* demised two messuages with a garden, for 21 years, from 25th *December* then next, at a yearly rent, to *Francis Gritton* and *William George*, churchwardens, and *Thomas Day*, overseer of the poor of *St. Peter's*, *Hereford*, who covenanted for themselves and their successors, churchwardens and overseers of the poor of the said parish of *St. Peter's* for the time being, that they and their successors, churchwardens, &c. would from time to time, and at all times during the term, at their own costs and charges, keep in good and tenantable repair the demised premises, and at the end of the term leave the premises in such good and tenantable repair, together with all such buildings as the lessees and their successors, churchwardens, &c. might erect upon the premises; and also that the lessees and their successors, churchwardens, &c. should not convert the premises, or any part thereof, into a burying ground, but, on the contrary, should keep the same for a workhouse for the use of the parish, or for such other purposes as they might think proper, provided the premises were left at the end of the term in the state and condition they were in at that time. The award went on to state, that under this lease the premises were occupied by the parish officers until 25th *December*, 1828, when the term expired; and that the two messuages had been converted into one workhouse, and then continued in that state. The occupation of the premises continued, and the rent was paid by the parish officers until 2d *February*, 1833, when possession was given up to the plaintiff, after notice to quit given by the parish officers. Previously to the expiration of the term, *Woakes* assigned the reversion to *Henderson*, who in *February*, 1829, assigned it to the plaintiff. The arbitrator found that the covenant to repair was broken

by *Gritton*, *George*, and *Day*, at the expiration of the lease, and that the dilapidations amounted to *53l.*; and that such amount still continued at the time possession was given up, but no more. He also found, that the covenant for leaving the premises in the same state and condition as at the time of the demise, was broken at the expiration of the lease, if the Court should be of opinion that the non-conversion of the workhouse into two distinct tenements constituted a breach thereof. If the defendants were to be considered as holding after the determination of the lease, as upon the terms of tenant from year to year simply, then he found that they had fully repaired the premises during the whole of such their yearly tenancy, so far as such tenants are liable. If they were to be considered as holding subject to the same terms as were contained in the lease, then, as to the amount of dilapidations, he did not find any thing to be due beyond the *53l.* due as before stated, on 25th *December*, 1828, and which still continued due on 2d *February*, 1833, the dilapidations being the same at both periods; but he found that the reconversion of the workhouse into two houses, in the same state and condition as at the time of the original demise, would cost *5l.* On this statement of facts for the opinion of the Court, the arbitrator awarded that a verdict should be entered for the defendants, unless the Court should be of opinion that the plaintiff was entitled to recover the said several sums of *53l.* and *5l.* or either of them; and according to such decision of the Court, he awarded that the verdict should be reduced to the sum of *58l.*, *53l.*, or *5l.*, with 40*s.* costs. A rule was obtained to show cause why the verdict and judgment should not be entered for the plaintiff for *53l.* or *5l.* or both, and why the award should not be set aside, on the ground that the arbitrator ought to have directed a verdict for the plaintiff for *58l.* or *53l.* or *5l.*

Talfourd, Serjt., and *Godson*, now showed cause.

Maule and *R. V. Richards*, in support of the rule, cited *Digby* v. *Atkinson* (*a*), to show that the obligations of the lease rested on the defendants by reason of their holding over after the expiration of the lease. They also referred to 59 *Geo.* 3, c. 12, ss. 8 and 17.

Cur. adv. vult.

Lord DENMAN, C. J., subsequently (30th *January*) delivered judgment.—This action was referred to a Barrister, who found certain facts specially for the consideration of the Court. It appeared that the plaintiff had bought the premises from a person who had let them to the defendants' predecessors for a term of 21 years, which had expired before the purchase; that one of the covenants in the lease was, that the lessees would restore the premises at the end of the term in proper repair, and in the plight in which they were at the beginning of the lease; that the premises had been converted during the term from two cottages into one workhouse, and were in that condition when the lease expired, and so continued till the action brought, in the possession of the successive churchwardens: but that in all other respects the defend-

(*a*) 4 Camp. 275.

King's Bench.

JOHNSON v. The Churchwardens and Overseers of ST. PETER, HEREFORD.

ants, since the end of the term, had fully performed the covenants in the lease. The arbitrator found damages to the extent of the deterioration caused by the premises remaining in that state, subject to the opinion of the Court; but made his award in the defendants' favour, if we should think them not liable to make good that damage. The plaintiff relied on the general principle, that where premises are held over by the same tenant of the same landlord, after the expiration of a lease granted to the former by the latter, without a new contract, the law will imply an agreement to hold on the same terms. He cited the case of *Digby* v. *Atkinson* (*a*), where a party so continuing, having been originally bound by his convenants to keep in repair, was held liable to make good a loss by accidental fire. *Digby* v. *Atkinson* would have been applicable, if the decision of that case had been in respect of a fire which had happened during the term. But in respect of a fire so happening, the plaintiff could only have had an action of covenant upon his lease, not an action of *assumpsit* on the breach of an implied contract arising out of a new tenancy from year to year, where the defendants became tenants of premises in that very condition which they are supposed to have undertaken they should never fall into. The change of parties produces another difficulty. The defendants were and are clearly liable to their original lessor on their breach of covenant. How then can they be also liable to their new landlord for the same damage as arising from the breach of their implied undertaking. This would be manifestly unjust. But there is no injustice in confining the remedy to that party, the convenant with whom was broken, who has either sold the premises for a lower price for that reason, or has received the full price on the supposition that the damage is to be made good. In the former case he may sue on his own account, in the latter as trustee for his vendee. Something was said on the alteration of the law relating to churchwardens; but we do not think it could affect the present question, as the former lease, to whatever extent it may be binding, is not the actual contract, but only evidence of the contract that came into existence upon its termination.

Rule discharged; the verdict and judgment to be entered for the defendants.

(*a*) 4 Camp. 275.

HALL *v.* COLE.

1. Declaration on a bill of exchange, describing it as drawn by one *J. S.* on *J. W.*, indorsed by *the said J. S.* to the defendant, by the defendant to the said *J. S.*, and by the said *J. S.* to the plaintiff. Plea: that the plaintiff, without the knowledge of the defendant, took from the said *J. S.* a cognovit in an action brought by the plaintiff against the said *J. S.*, and so gave him time, whereby defendant was discharged:—*Held*, that the plaintiff must be considered, from the statement in his own declaration, to have known that *J. S.* who drew the bill was the same person with *J. S.* who indorsed it to him, and that his taking a cognovit from such a person was a discharge of the defendant, who was in fact a subsequent party to the bill.

2. The omission in the plea to state that the cognovit was given before action brought, or to state when it was given, so as to show whether the plea ought to have been in bar of the action generally, or only in bar of the further maintenance of the action, is only ground for special demurrer.

DEMURRER to a plea. *Assumpsit* on a bill of exchange drawn on *Joseph Watkinson* by *James Stewart*, and indorsed by him to the defendant, and by him again indorsed to the said *James Stewart*, and by the

said *James Stewart* indorsed to the plaintiff. *Plea:* that after the presentment and dishonour of the bill, the plaintiff, without the knowledge and authority of the defendant, took and received from the said *James Stewart* a cognovit in a certain action brought on this bill by the plaintiff against the said *James Stewart*, in the Court of *King's Bench*; and by such cognovit the plaintiff gave to the said *James Stewart* a much longer time than would have been necessary to obtain judgment in that action, whereby &c. *General demurrer* and *joinder.*

Archbold, in support of the demurrer.—The plea is bad. In the first place, it is pleaded in bar of the action generally, and it states the cognovit to have been taken after the presentment and dishonour of the bill, but it does not state that it was taken before the commencement of this action. [*Littledale*, J. —Is not that matter for special demurrer only?]—No; it is a substantial part of the defence, and the omission of the statement may therefore be taken advantage of on general demurrer. If the time was given after the commencement of the action, it might have been pleaded in bar of the further maintenance of the action. It could not then have been given in evidence under the general issue; *Lee* v. *Levi* (*a*). [Lord *Denman*, C. J.—Is there any other objection to the plea?]—Yes. The time at which the defendant became liable to the plaintiff as a party to the bill is not distinctly shown. The name of *James Stewart* first appears as drawer, and then as indorser to the defendant, and afterwards as indorser to the plaintiff. It is, therefore, to be presumed, that the action against *Stewart* was brought against him as immediate indorser to the plaintiff. If so, the plea contains no matter of defence to an action brought against the defendant as a previous indorser of the bill. The plea ought distinctly to have shown that the action in which time is alleged to have been given, was an action against a party who was a party to the bill before the defendant.

Wightman, contrà.—The main point here is, whether time given to a previous party on the bill does discharge a subsequent party. The identity of the party clearly appears here, for he is called *the said James Stewart.* The objection to the plea amounts to no more than a formal objection, that the plea should have been in bar, not of the action generally, but of the further maintenance of the action. In that case the demurrer should have been special, and not general. The argument on the other side avoids all notice of the fact, that the plea states, that the plaintiff suing a previous party, took a cognovit from him, whereby the defendant was discharged. Taking a cognovit at least suspended the plaintiff's right of action. Then, if the condition on which the party took the cognovit was not fulfilled by the party giving it, the former could not resume all his original rights as to other parties on the bill. A thing or action personal once suspended by the act of the party, is extinct for ever (*b*). This principle was distinctly acted on in *Gould* v. *Robson* (*c*). *Stewart* was the person ultimately liable, so far as this action is concerned, and time given to him was a prejudice to the parties intermediately liable on the bill. In *Britten* v. *Webb* (*d*), the plaintiffs drew a bill upon one

(*a*) 4 Barn. & Cress. 390.
(*b*) Dyer, 140.
(*c*) 8 East, 576.
(*d*) Chitty on Bills, last edit. p. 29; 3 Dowl. & Ryl. 650; and 2 Barn. & Cress. 483.

F. W., and indorsed it to the defendant, and by him it was again indorsed to them; and it was held, that the plaintiffs, being liable to the defendant as drawers and indorsers, could not maintain an action against him upon the bill, according to the usage and custom of merchants.

Archbold, in reply.—If the case of *Britten* v. *Webb* is meant to be put forward as going to the extent now stated, it is not law. Such transfer of bills are common, and are quite in accordance with the usage and custom of merchants. A general demurrer is sufficient in this case.

Lord DENMAN, C. J.—The objection that the plea ought to have been pleaded not generally in bar of the action, but in bar of the further maintenance of the action, is an objection in form and not of substance, and ought to have been made the subject of a special demurrer; and that not having been done, advantage cannot be taken of the omission. With respect to the point, that the drawer had time given him, I have felt much doubt whether it should not have been averred in the plea, that when time was so given, the plaintiff was aware that he was dealing with the same person who was the party liable as drawer of the bill. For there is some difficulty in saying on the plea, that the plaintiff was aware that he was doing any thing that would discharge the drawer himself. It is doubtful whether he thought that the *James Stewart* who drew the bill, was the same *James Stewart* who indorsed the bill to him. But I felt this doubt only on the plea; for when I find that in the declaration the plaintiff himself describes *James Stewart* as *the said James Stewart*, and so acknowledges his identity, my doubt at once disappears, for I feel that his own averment is a complete answer to the objection.

LITTLEDALE, J.—As the plaintiff has described in his declaration, the *James Stewart* who drew the bill, and indorsed it to him, as the said *James Stewart*, he must be taken to know that the drawer and indorser were the same person. That being the case, and as it appears that the cognovit was given by a person who was a party to the bill before the defendant, there can be no doubt that the defendant was discharged, who was only a party subsequently liable. It may be consistent with the plea, that the cognovit might or might not have been given before action brought; but I think that uncertainty should have been made matter of special demurrer.

WILLIAMS, J.—It appears sufficiently clear on the whole record, that the drawer of the bill, and the person who indorsed it to the plaintiff, were the same person, and that the plaintiff was aware of that fact; consequently, that person was a party to the bill previous to the defendant. Time was given to him by the plaintiff. That unquestionably discharges the defendant. The other objection is matter of form only, and should have been made the subject of a special demurrer.

COLERIDGE, J.—*James Stewart* who drew the bill, and *James Stewart* who indorsed it to the plaintiff, appear to be the same person. If so, and the cognovit was taken from him in one character, it would be a fraud to sue him

in another, in respect of the same transaction. Nor can the plaintiff who took that cognovit sue any other person only mediately liable, when he has discharged the person ultimately liable.

Judgment for the defendant.

BATCHELDOR *v.* HODGES.

DEBT on the 17 *Geo.* 2, c. 3. The declaration stated, that the plaintiff was an inhabitant of the parish of *New Windsor*, and that the defendant was assistant overseer of the same parish; that a rate had been duly made and allowed, and the plaintiff requested the defendant, as such assistant overseer as aforesaid, to permit him, the plaintiff, to inspect the said rate, and tendered the defendant one shilling for the same; and although the said defendant, as such assistant overseer as aforesaid, had the said rate in his possession, the defendant would not permit the plaintiff to inspect the rate, but refused so to do, *contra formam statuti*, whereby plaintiff became entitled to sue for 20*l*. *Pleas:* First, *Nunquam indebitatus.* Secondly, That at the time when the plaintiff requested the defendant to permit the plaintiff to inspect the rate, the plaintiff had no right to require the said inspection, the said rate, in the declaration mentioned, not being a subsisting rate for the relief of the poor of the said parish, or such a rate as the plaintiff was entitled to inspect. Thirdly, That the rate mentioned in the declaration was an old rate, &c.; that the time for appealing against and questioning the validity of the rate, had expired long before the demand of inspection, and that no appeal had been made, nor any notice of appeal given, by the plaintiff against the said rate, or of an intention by him to question the validity of the said rate, before or at the time when he requested the defendant to permit him, the plaintiff, to inspect, wherefore he refused, &c. Fourthly, That after the rate was allowed there was held a General Quarter Session for the Borough of *New Windsor;* that no notice of appeal was given, &c.; and that the time, &c. had elapsed long before the request made to inspect, wherefore the defendant refused, &c. The plaintiff took issue on the first plea, and demurred generally on the three others. *Joinder in demurrer.*

1. In debt, on the 17 *Geo.* 2, c. 3, s. 2, against an overseer, for refusing to allow inspection of the rate; it is sufficient to allege in the declaration, that the plaintiff is an inhabitant of the parish, without going on to say that he is a rated inhabitant.

2. That statute applies to assistant overseers, who have the custody of the rates, as well as to overseers, the words of the second section being referable to the words of the first, where the expressions used are, "churchwardens, overseers, or other persons authorized to take care of the poor."

3. The statute applies to old as well as modern rates, and to those against which the time for appealing has elapsed, as well as subsisting rates.

Curwood, in support of the demurrer.—The right of an inhabitant to inspect the rates is general, and that right is given him for the purpose of his being able to tell whether he should appeal against the rate or not, and also to see whether he may be entitled to vote at the next election. [Lord *Denman*, C. J.—The second plea denies the right, because the rate is not a subsisting rate.]—It may be a subsisting rate, though a subsequent rate may have been made, for all the arrears of the old rate may not have been paid up.

Channell, contrà.—The second plea is an answer to the action. The right of an inhabitant to inspect is limited to a subsisting rate. [Lord *Denman*, C. J.—Subsisting is too general a word.]—Then the plea should have been

demurred to on that account. If the plea is bad, the declaration here is defective. There is no sufficient statement, that the party who brings the action is the party aggrieved. *Spencely* v. *Robinson* (*a*) shows, that in order to entitle a party to sue in this action, he must show that he sustained an injury by the act of the overseer. That case was considered in *Bennett* v. *Edwards* (*b*), which it must be admitted overrules *Spencely* v. *Robinson*, unless a distinction is established between them. In *Bennett* v. *Edwards*, it was proved at the trial, that the party complaining was a rated inhabitant; it must therefore be taken, that, in order to maintain this action, he must show that he is a rated inhabitant, and that the defendant is a person whose office imposes on him the duty of allowing the inspection of the rate. The omission to do both these things may be cured by verdict; but, until after verdict, is fatal to the action. This is clear from the reasoning of the judges in *Edwards* v. *Bennett* in error (*c*); and indeed one expression of Lord Chief Justice *Tindal* there goes directly to that extent. Now, here, it is clear that the defendant was merely assistant overseer, and it is not distinctly stated that the plaintiff was a rated inhabitant.

Curwood, in reply.—The defendant is admitted, upon the face of the record here, to be the proper party to have the custody of the books, and no question can, therefore, be raised here as in *Bennett* v. *Edwards*, respecting the general liability of an assistant overseer, for he is here shown to have the particular duty cast upon him by the nature of his office.

Lord DENMAN, C. J.—Some observations have been made on the supposed insufficiency of this declaration. It appears to me that it is perfectly good. The decision of the Court in *Spencely* v. *Robinson* introduced a new term into the Act of Parliament, and in effect almost repealed its provisions. This must now be taken to have been dropped by general consent. It was, in fact, not repudiated in the late case in which the declaration was held good, although, as in *Spencely* v. *Robinson*, it did not state that the plaintiff was a rated inhabitant, nor that he was aggrieved by the refusal of inspection. It is obvious that a party may be aggrieved by the very fact of not being rated. Upon the second point we have been referred to *Bennett* v. *Edwards*, in which it was said, that an assistant overseer was not a person who, as a matter of course, was authorized to take care of the rates; and to *Edwards* v. *Bennett* (in error), in which the Lord Chief Justice *Tindal* said, that the objection to the declaration, on that ground, must have prevailed on demurrer. He may, possibly, have meant *special demurrer*. I cannot think, that, at all events, he meant more than that. In that case he says, that the assistant overseer is not necessarily a character recognized by the law, but that he may be so. It seems to me that he is so; and I think that it is impossible to bring any person more clearly within the Act of Parliament than the defendant, who, it appears, was assistant overseer, and as such had the custody of the rates, which, according even to *Bennett* v. *Edwards*, would establish a duty to allow the inspection of them. A refusal to produce the rate, by a party thus possessing the means of withholding it, is the very mischief which the statute was intended to remedy.

(*a*) 3 Barn. & Cress. 658.
(*b*) 7 Barn. & Cress. 586.
(*c*) 6 Bing. 230, and 3 Younge & Jervis, 458.

LITTLEDALE, J.—The second point appears to me to be decided by *Bennett* v. *Edwards*. The assistant overseer had the custody of the books, and, according to that case, he is within the meaning of the statute. The next objection is, that the plaintiff does not aver that he is a rated inhabitant, so as to bring himself within the words of the Act of Parliament. The statute says nothing of his being a rated inhabitant. As an inhabitant, he may have an interest in seeing the rate, although not himself rated. He may desire to see whether he is rated or not, as there are some privileges connected with being rated, of which he might be deprived, if improperly left out of the rate; or he may wish to take another house in the parish, but may want to know, before he takes it, what sum it is rated at. There is nothing to call on us to say, that it is necessary that he should appear in the declaration to be a rated inhabitant.

WILLIAMS, J.—I am of the same opinion. We have no right to import a term into the Act of Parliament. If the legislature had intended that none but rated inhabitants should have the right of inspection, the enactment should have so expressed it. If the plaintiff, as an inhabitant, had a right to inspect, and inspection was refused, he was clearly a party aggrieved within the meaning of the Act. With respect to the point, as to the defendant's being an assistant overseer. Here it appears, on the face of the declaration, that the defendant was assistant overseer. It seems that some doubts have arisen as to the precise character and quality of this person's duty. In the present instance, it is clear that he was entrusted with, and had the possession of the rate, and this, I think, brings him within the language of the Act, which is very general, the expression being, "the overseers of the poor, or other persons authorized as aforesaid."

COLERIDGE, J.—There can be no doubt, that, under the statutes 17 *Geo.* 2, c. 3, and 17 *Geo.* 2, c. 38, in both of which the rule is laid down in *pari materia*, the rule applies equally as well to the old rates as to modern rates, and it is clear that this person had a right to see the old as well as the new rates. The overseers are bound, by the 13th section of the latter Act, to keep a book wherein to enter attested copies of all rates and assessments, which book is to be carefully preserved in some public place, to which all persons assessed, or liable to be assessed, may freely resort. There are two objections to the declaration. With respect to the first we must look at the words of the statute. It would be an extraordinary thing if a declaration, in the words of the statute, were held not to be good upon the face of it. Here it is in the very words of the statute. As to the second objection, we must look at the section which gives the right of inspection, and imposes the penalty. There are three sets of persons liable—"Churchwardens, overseers, or other persons authorized as aforesaid,"—*i. e.* (by reference to the first section,) "authorized to take care of the poor." The very term "assistant overseer" of itself imports that he is a person "authorized to take care of the poor."

Judgment for the plaintiff.

MORRELL *v.* HARVEY.

The highway act, 13 *G.* 3, c. 78, ss. 30 & 45, directing the assessment for highway rate, enacts, that it shall be an equal assessment on the occupiers, not exceeding 9*d.* in the pound *on the yearly value* of the lands, &c.:—*Held*, that a cognizance alleging an assessment not exceeding 9*d.* in the pound upon all occupiers of lands, was not sufficient, without expressly alleging that it was an equal assessment *on the yearly value.*

REPLEVIN. Cognizance as constable of the hundred of *East Barnfield*, in the county of *Kent*, under a warrant of distress. The cognizance stated that the plaintiff was the occupier of certain lands &c. within the parish of *Hawkhurst*, of large yearly value, and by law liable to be assessed for and toward the amending of the highways within the parish, according to the form of the statute in such case made and provided, in respect of his occupation of the said lands, &c., and that *L. B.* and *J. N.*, during all the time aforesaid, were surveyors of the highways within the said parish, and as such surveyors, on the 4th of *October*, 1832, at a special session for the highways, held at &c., before *L. N.* and *F. L. H.*, justices &c., made application to the said justices, and prayed them, that an order might be granted for making an assessment of 9*d.* in the pound upon all occupiers of land, &c., within the said parish, and that the justices at such session being satisfied that the statute duty &c. had been performed &c., and that due notice of the intention to apply to the special sessions had been given, did, by their order in writing, order that an equal assessment, not exceeding 9*d.* in the pound upon all occupiers of lands &c. within the parish, should be forthwith made by the surveyors, and be allowed and collected, and that the money be applied for and towards the amending &c. such highways &c. The cognizance then stated, that due notice of the application had been given, that in pursuance of the order an equal assessment, not exceeding 9*d.* in the pound, upon all and every the occupiers of lands &c. within *Hawkhurst*, was made and duly allowed; that the plaintiff was assessed for and in respect of the said lands &c. then in his occupation, within the said parish, in the sum of 45*l.* 18*s.* 4½*d.* being after the rate of 9*d.* in the pound; that 31*l.* 0*s.* 9$\frac{3}{4}$*d.*, parcel thereof, was unpaid; that the surveyor made complaint, and that a distress-warrant was granted, and the defendant justified under the distress-warrant. *Special demurrer:* assigning seven causes of demurrer, of which it is now only necessary to state the second, which was, that the cognizance ought to have shown that the order for the assessment was an order for an assessment of so much in the pound, on *the yearly value* of the lands &c. in the parish, and that the assessment was such an assessment accordingly, neither of which is shown.

Wightman, in support of the demurrer.—The assessment here is clearly bad. It is made upon the 30th section of the 13 *Geo.* 3, c. 78, which expressly provides that no such assessment "shall exceed the rate of 6*d.* in the pound, of the yearly value of the lands and tenements." This assessment does not show on the face of it, that it is made under this provision. In *Gill* v. *Scrivens* (*a*), it was laid down, that where, in a clause imposing a forfeiture, there is an exception, the party suing for the forfeiture must negative the exception. The principle of that case must govern the present (*b*). The

(*a*) 7 Term Rep. 27.

(*b*) But see *Steel* v. *Smith*, 1 Barn. & Ald. 94, where it was held, that this is not necessary where the exemption is contained in a proviso not incorporated with the enacting clause by any words of reference.

next objection—[Lord *Denman*, C. J.—It appears very doubtful whether there is any question here necessary to be decided, except as to the goodness of the cognizance in not setting out the subject-matter of the rate, and the yearly value of the land on which the assessment is made—for this appears to be necessary under the statute, to entitle the justices to assess at all. If that is so, no other point will come into discussion.]

Channell, contrà.—This assessment does not depend for its validity solely on the 30th, but also on the 45th section of the statute, and under that section it is good.

Cur. adv. vult.

Lord DENMAN, C. J., afterwards (30th *January*) gave judgment.—The defendant makes cognizance as bailiff of the hundred of *East Barnfield*, under a warrant of distress, directed to him by two justices of the peace, for levying a highway assessment. The cognizance avers, that the two way-wardens made application, at a special sessions, for an assessment of 9*d.* in the pound on all occupiers of lands, tenements, woods, tithes, and hereditaments, and that the justices ordered such assessments upon all occupiers of lands &c. to be forthwith made; and it then proceeds to justify the taking under a warrant of distress issued for non-payment of such assessment. This cognizance was demurred to for numerous causes, one of which, we think, raises a valid objection. The act requires that the rate shall not exceed 9*d.* in the pound on the yearly value of the lands, &c., subject to be rated. The averment is, that the assessment was made on the occupiers of lands &c., and that it did not exceed 9*d.* in the pound; but not (as the statute requires) that it did not exceed 9*d.* in the pound on the yearly value of such lands, &c. The averment that the assessment does not exceed 9*d.* in the pound, has of itself no meaning, but must be referred to something; and if, consistently with the ordinary use of words, it can be referred to lands &c., which are mentioned immediately before, the statement will still be defective—for the meaning must then be the value of the lands, and not their yearly value. For this defect, without considering the others alleged, our judgment must be for the plaintiff.

Judgment for the plaintiff.

DOE *d.* TATHAM *v.* WRIGHT.

EJECTMENT, tried before *Gurney*, B. at the *Lancaster* Summer Assizes, 1834; verdict for the defendant. The lessor of the plaintiff claimed

In ejectment, to try the validity of a will, the question turned upon the sanity of the devisor, arising from general imbecility. Letters of various dates and upon various subjects, written to him by persons of respectability, since dead, in which he was addressed as a person of sound mind, found shortly after his death in his library with the seals broken, were tendered and received in evidence, without any proof of answers being returned, or any other act done by the devisor in relation to them:—*Held*, on motion for a new trial, on the ground of the improper reception of evidence, that the letters were not admissible:—*Held* also, that if evidence had been given of any act done in relation to them by the devisor, the letters would have been admissible:—*Held* also, that as they were improperly received in evidence, the proper course was to grant a new trial, without entering into any inquiry, as to what might have been the extent of their affect, or whether, without them, there was sufficient evidence to sustain the verdict.

King's Bench.

Doe d. Tatham v. Wright.

as heir at law of *John Marsden*, deceased. The defendant claimed as devisee under his will. The point to be tried was the validity of that will, depending on the question, whether Mr. *Marsden* was, at the time of making the will, of sound mind, or from natural imbecility incapable of making any disposition of his property. It appeared that Mr. *Marsden* lived to be nearly 70 years of age; and evidence was given applicable to the greater portion of his life. The description of evidence was, the opinions of witnesses who had been acquainted with him; and evidence of his acts and conduct, and of the mode in which he was treated by others, together with the manner in which he received that treatment. Amongst other evidence, the defendant tendered several letters of various dates and upon various subjects, written to Mr. *Marsden* by persons of respectability, some of them, but not all, having a post mark corresponding with the date, and in all of them Mr. *Marsden* was addressed as a person of a sound mind. It was shown by extrinsic evidence, that these letters were found with many others, shortly after the death of Mr. *Marsden*, in his bureau in his library, with the seals broken: it was also shown, that the persons by whom they were written were well acquainted with Mr. *Marsden*, and that they were dead; and their handwriting was proved. It was not, however, shown that any answers had been returned to them by Mr. *Marsden*, or that any letters had been written by him, to which they might have been answers, nor that any act whatever had been done by Mr. *Marsden* in relation to them. The object with which the letters were tendered, was to show the manner in which Mr. *Marsden* was treated by the writers of them. The learned judge received the letters (*a*). A rule was granted for a new trial, on the ground, amongst others, of the improper reception of the letters in question.

Sir *F. Pollock*, *Atcherley*, Serjt., *Wightman*, *Tomlinson*, and *Martin*, showed cause.—This being a question of sanity, where the alleged insanity arises from general imbecility, the evidence necessarily extended throughout the whole period of the life of the deceased. The only evidence which can be adduced on such a subject seems to be one of three descriptions—either the acts, conduct, and declarations of the party whose sanity is in question—the conduct of other persons towards him, and their treatment of him—or, lastly, the opinions of persons who are competent to form a just opinion on the subject. The letters in the present case were tendered and received, as being evidence of the second class; and as showing, by unequivocal acts, what was, at the time, the manner in which Mr. *Marsden* was treated by the persons who wrote them. It is not contended that they were receivable as evidence of opinion, they were merely offered as evidence of treatment. On that ground it is contended, they were receivable (*b*). The admissibility of the letters of a wife to her husband in actions for criminal con-

(*a*) This ejectment had been before tried before *Gurney*, B. at the *Lancaster* Spring Assizes, 1833. On that occasion these same letters were tendered and rejected by the learned judge. A bill of exceptions was then tendered and sealed; and on error brought in the Court of *Exchequer Chamber*, a difference of opinion existed among the judges. No judgment was however given on the point of the admissibility of the letters, because a *venire de novo* was awarded on another point. The learned judge stated on this occasion, the difference of opinion abovementioned; and on that ground received the letters, that the subject might undergo further consideration.

(*b*) 1 Starkie on Evidence, p. 57, 2 edit.

versation, furnishes a strong analogical argument. In cases of that description they are received, for the purpose of showing the character of the relation of the parties towards each other at the time. Here also the letters were offered to show the relation in which Mr. *Marsden* stood with the writers; or, in other words, in the manner in which he was treated by them. *Trelawney* v. *Coleman* (*a*) and *Willis* v. *Bernard* (*b*), are the authorities on this branch of the argument. In the Ecclesiastical Courts, evidence of this description appears to be constantly admitted on questions of the same kind. This, though not direct authority, is still entitled to very considerable weight. It was done in *Waters* v. *Howlett* (*c*); and although the point does not appear in the report as printed, the manuscript notes of the learned editor show that such was the case. The same point arose, though not so distinctly, in *Wheeler and Batsford* v. *Alderson* (*d*), and was decided in the same way. Even, however, if the evidence was improperly received, that is no ground for a new trial, if the Court can see that upon the whole of the evidence there was sufficient without the letters to maintain the verdict. *Doe* d. *Lord Teynham* v. *Tyler* (*e*), *Horford* v. *Wilson* (*f*), *Edwards* v. *Evans* (*g*), *Nathan* v. *Buckland* (*h*), and *Tyrwhitt* v. *Wynne* (*i*). [*Coleridge*, J.—Are you aware of two cases since *Doe* v. *Tyler*—the one *Crease* v. *Barrett* (*k*), in the *Exchequer*, and the other *De Rutzen* v. *Farr* (*l*) in this Court—in which *Doe* v. *Tyler* was considered, and a different conclusion come to?] The motion for a new trial is an application to the discretion of the Court, which they will not grant unless substantial justice cannot be done without it (*m*). In the present case, there was abundance of evidence, besides the letters in question, to maintain the verdict. Besides, the present action being an ejectment, there is no such strong reason for granting a new trial, as there might be in cases where the judgment is conclusive. Another reason might be urged why no new trial should be granted; it is not the best remedy. A bill of exceptions might have been tendered: or the Court may now withhold the new trial, unless the plaintiff will consent to a special verdict.

Cresswell rose in support of the rule. He was stopped.

Cur. adv. vult.

Lord Denman, C. J., on a subsequent day (*Feb.* 1) delivered judgment.—This case rests at present on a single point, that of the admissibility of certain letters tendered on the trial of the question, whether the testator was competent to make a will. The plaintiff denied the testator's competency, alleging his entire natural incapacity. Such an issue opens a wide door for the admission of evidence, as every transaction of the testator's life, every expression he ever used, and his manner of conducting himself on the most ordinary concerns, may have a bearing on the question. The letters

(*a*) 1 Barn. & Adol. 90.
(*b*) 8 Bing. 376.
(*c*) 3 Hagg. Eccl. Rep. 790.
(*d*) 3 Hagg. Eccl. Rep. 609.
(*e*) 6 Bing. 56.
(*f*) 1 Taunt. 12.
(*g*) 3 East, 451.
(*h*) 2 Moore, 153.
(*i*) 2 Barn. & Ald. 554.
(*k*) 1 Cromp., Mees. & Ros. 919, 1 Tyr. & G. 112.
(*l*) 5 Nev. & Man. 617.
(*m*) 1 Stark. on Evid. 468, 2 ed.

King's Bench.

DOE d. TATHAM v. WRIGHT.

tendered, written at the time of their several dates, by respectable persons now deceased, who were acquainted with the testator, had been found in his house, with the seals broken, shortly after his death. No other circumstance was proved relative to these letters,—no act of the testator's was shown to have produced them, or to have followed upon them. But it has been strongly contended before us, as it was at the trial, and as it had been argued in a former stage of the cause, that the contents of these letters ought to be laid before a jury, as showing in what manner the testator was treated by the writers; and such treatment, abstracted from all corresponding conduct on his part, was said to be evidence to disprove his alleged imbecility. Without dispute, any—the least—act done by the testator, with reference to the letters, would have made them evidence; for such act could not be properly explained without recourse to them. And if received, no rule of law could have prevented their full effect from being produced on the minds of the jury. An attempt was accordingly made to show that he had done something with them, for it was said, that as the seals were broken, a presumption arose of his having read them. But this would be a strong presumption, where the testator's imbecility is the very fact in issue; and even if the presumption be made, as the power to read is not inconsistent with such a character of mind, it is plain that no inference arises from his having read them. He may have thrown them aside when read, from utter incapacity to understand them; and the state in which they were found affords no evidence, which makes that hypothesis less probable than the other. The manner in which a man is treated by persons ignorant of his intellectual character, would be obviously of no value. But even if well acquainted with him, their treatment does not prove their opinion. The respectful phrases may be ironical, or employed for the very purpose of circumventing the party addressed, on the presumption of his imbecility. This might be apparent, from the language itself, to those who knew the habits of the writer. It is no answer to say that such remarks are rather on the effect than the admissibility of the evidence, and fit for the consideration of the jury. We do not think it worth while to observe here, that those who produce the letters may be much more reasonably expected to explain them by circumstances, than those against whom they are produced. This may be an observation on their effect, while what has been said appears to us to prove, that it must be a matter of complete uncertainty whether these letters, written by strangers to the suit, do or do not express their genuine sentiments. The learned counsel will, however, remind us, that they disclaim the letters as proofs of the opinion of the writers, or of any fact mentioned in them, and that their only object is, to show the treatment which the testator received from other persons. But if it be admitted,—and we think it cannot be denied,—that the letters would prove absolutely nothing, if they proceeded from persons unacquainted with the deceased, or if they were insincere and hypocritical, it inevitably follows, that their relevancy to the question does depend on their representing the real opinion of the writers. Indeed we apprehend that no person can really doubt that this is the only rational view in which they can be considered applicable; and however ingeniously the proposition may be wrapped up, we can discover no other principle on which a man of plain common sense could permit the letters to influence his decision of the matter in issue. Letters written may be said to be an act done,

but so likewise are declarations made; and letters without correspondence we cannot distinguish from oral declarations, proved to have been made at the same time, and left without an answer. Who does not perceive that declarations would be much more probably true, if made by the party to his own confidential friends, than if addressed to him, whose state of mind they are supposed to elucidate. Yet these are admitted on all hands to be no evidence. The hardship of excluding these letters was powerfully urged, since it was said that letters of a contrary tendency might undoubtedly have been given in evidence; and that the jury were in fact much influenced by the manner in which the testator was treated by children pursuing him in the street like one deprived of reason. But the answer is, that letters of a contrary tendency, tendered under the same circumstances, have never, to our knowledge, been held admissible, nor, in our opinion, could they be received. So the insults offered to him as an idiot by boys when he walked out, are not evidence, as the acts of the boys, their treatment of him as such, is nothing; but the manner in which he received that treatment falls within the scope of our rule, and may certainly furnish strong proofs in affirmance or refutation of the proposition under inquiry. The argument for the defendant appears indeed to be founded on a fallacious use of the word "treatment." The behaviour of *A.* to *B.* may, without impropriety of language, be called "treatment" of him, though he be absent or asleep, and wholly unconscious of what is done. *A.* might thus evince his high or mean opinion of *B.*'s understanding and character, but such proof of his opinion is allowed to be no evidence in a Court of Justice. If such behaviour were observed by *A.* towards *B.* in his presence, and while he was in a state of consciousness, his conduct in return, with reference to the forms of society, and to the natural feelings of human nature in similar circumstances, might afford strong evidence of the state of his intellect. In this latter case the treatment of *B.* by *A.* must be given in evidence, not as treatment, but because *B.*'s conduct thereupon cannot be understood without it. This bears an exact resemblance to letters sent and answered, or dealt with in any way; the former case is that of letters merely written and received, without proof that the party receiving them did any thing in respect to them. Though it can hardly be necessary to guard against misconception in this particular, we may as well observe, that our exclusion is only of these letters as independent evidence. If any such had been written by living persons, who came on the trial to give an opinion on the testator's capacity, at variance with that to be collected from his letters, these might have been placed in their hands for the purpose of cross-examination, and under some circumstances might have been given in evidence to contradict their statement. We are not told of any case before the present, in which evidence of this description has been admitted in our Courts. In the absence of authority, one analogy was thought to come near the principle contended for,—the reception, in an action for criminal conversation, of letters written by the wife to the husband at an earlier period. But this evidence stands on a different and clear ground; for letters so written before the separation are part of the conduct pursued by the wife towards her husband, showing that she treated him with kindness, and that he has been deprived of an affectionate partner. On questions of this kind at Doctors' Commons, we were informed that the evidence of treatment arising from the letters of

third parties has been received. We feel great respect for the authority of Ecclesiastical Courts, and should lament the adoption of inconsistent rules of evidence there and in *Westminster Hall*. But we must observe, that the reports of any such decision are not satisfactory, and that they can have no weight without an accurate statement of all particulars. We can easily conceive, that under the general term "treatment" letters from other persons might be looked at to disprove incapacity; but we can hardly imagine them to be brought forward so wholly stripped of circumstances as not to have proof of something done with them by the testator. Whenever papers of such a description shall be laid before any spiritual judge in this country, we see no reason to doubt that he will take the same view of their admissibility, as that which we are now declaring. We must by no means omit what passed in the *Exchequer Chamber*, where this identical question was raised, but not decided, because the judgment on another point rendered it superfluous. There is reason for believing, that of seven judges who sat in that Court of Error, four thought these letters were receivable, and three were of the contrary opinion. It is out of deference to the doubtful state in which the point was thus left, that we have thought it our duty to re-consider our first impression upon it, and enter fully into our reasons. Whatever may be the ultimate opinions of our learned brethren when they fully examine the question with reference to legal principles, and with the sense of judicial responsibility attached to their announcement of them, we are bound to act upon our own clear conviction, that the evidence was not by law admissible. Sir *F. Pollock* indeed suggested, that we might act upon the example of the *Common Pleas* in *Doe* d. *Lord Teynham* v. *Tyler*, and might enter upon an inquiry whether, even though this evidence may have been improperly received, there was not proof enough in the cause without it to warrant the verdict. But as this Court has so lately (*a*) on full consideration, and in conformity with a decision of the Court of *Exchequer* (*b*), disclaimed the discretion which appears to have been exercised by the Court of *Common Pleas* in *Doe* d. *Lord Teynham* v. *Tyler*, we need not repeat our reasons for holding, that where evidence formally objected to at *nisi prius* is received by the judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial. This must be considered as the judgment of my brothers *Littledale* and *Coleridge*, and myself. Our two brothers having been engaged in the cause while at the bar, have taken no part in the deliberation. I may, however, mention, that in a similar case (*c*) tried before my brother *Patteson* at *Wells*, in 1834, he received and rejected letters, according to the line which we have now drawn.

Rule absolute.

(*a*) In *The Baron de Rütsen & Wife* v. *Farr*, 5 Nev. & Man. 617.

(*b*) In *Crease* v. *Barrett*, 1 C.M. & Ros. 919; 1 Tyr. & Granger, 128.

(*c*) *Woodforde* v. *Burn*.

The Baron de RÜTZEN and Wife *v.* FARR.
The Same *v.* LLOYD (*a*).

DEBT for tolls on certain cattle, goods, and merchandizes brought for sale into a fair and market of the plaintiffs, in right of the Baroness, at *Narberth*, and bought there by the defendant. *Plea:* the general issue. At the trial before *Gurney*, B., at the Spring Assizes, 1834, for the county of *Pembroke*, the plaintiffs, in order to prove the title of the *Baroness de Rützen*, produced and put in, amongst other documents, accounts of rents and tolls received for the fair and market, found among the family muniments of title. Some of these accounts were in the handwriting of, and signed by, a Mr. *James* deceased, the steward of the plaintiffs' ancestor, in which the steward charged himself with the receipt of certain sums for the rent of the market. To these no objection was made. Other accounts of the same nature were produced, signed, not by the steward, but by a person named *Protheroe*, who styled himself the clerk to that steward. No evidence was given to show that this person ever was employed by the steward, but the papers were tendered as speaking for themselves. They were objected to by the counsel for the defendant, as not admissible in evidence; and it was strongly urged, that the papers signed by the supposed clerk were not receivable, as they did not even affect to charge the person signing them with any liability. They were, however, received in evidence by the learned judge, and a verdict was found for the plaintiffs. A rule had been obtained in *Easter* Term, 1834, calling on the plaintiffs to show cause why that verdict should not be set aside, and a new trial had, unless it should be agreed to turn the facts into a special case: but this was not done.

1. Accounts of the receipts of the tolls of a fair and market, signed by a person deceased, calling himself the clerk of the steward, also deceased, are not admissible as evidence of the title of a claimant to the tolls, though found amongst the muniments of the claimant's ancestor.

2. If inadmissible evidence be received it is ground for a new trial; and the Court will not consider the question of its materiality or effect upon the minds of the jury.

Cresswell and *John Evans* (the *Attorney-General* was with them) showed cause against the rule.—The admission of these accounts is not sufficient ground for a new trial, for the evidence they furnished was immaterial, and could not have affected the verdict.—[Lord *Denman*, C. J.—If the evidence was admissible at all, it does not lie in the mouth of the party offering it to say that it could not affect the case. *Coleridge*, J.—There was a case of *Crease* v. *Barrett*, lately decided in the *Exchequer* upon that point (*b*).]—The evidence here was clearly admissible. All the entries in the accounts were entries charging *James*, and though he did not make up these accounts, they were made up by a person in his employment, and were afterwards adopted by him. They must, therefore, be considered to be accounts made and signed by *James*, and being entries charging himself, are clearly admissible in evidence. In *Doe* d. *Lord Teynham* v. *Tyler* (*c*), the Court looked to the evidence to see whether it could have produced any effect on the minds of the jury. Here it is clear that the evidence was admissible, or, if not admissible, that as it was only in corroboration of other evidence, which was clearly admissible, the Court will, as in *Doe* d. *Lord Teynham* v. *Tyler*, look at the

(*a*) The first of these cases was argued in *Michaelmas* Term, 1835, (25th *November*;) the last in *Hilary* Term, 1836, (23d *January*.)

(*b*) Not then reported; since reported, 1 Cromp. Mees. & Ros. 919; *S. C.* 1 Tyr. & G. 112.

(*c*) 6 Bing. 561.

King's Bench.

The Baron de Rützen & Wife v. Farr.

The Same v. Lloyd.

other evidence, to see whether, on that alone, the jury might not properly have founded their verdict.

Sir *W. Follett*, (*Wilson* and *E. V. Williams* were with him, but were not heard,) in support of the rule.—*James* was the managing attorney and steward of a former tenant of this estate, and *Protheroe* was a clerk in *James's* office, and was in the habit of making out the accounts. The accounts thus prepared cannot possibly be evidence against a third party, for they are not papers in the handwriting of a person charging himself against his own interests: they were therefore inadmissible. There is nothing in this case to charge *Protheroe*, nor even *James*. Even if an action could be brought against *James*, the papers would merely be accounts found in the ancestor's possession, showing that accounts of the estate were rendered by *James* to him. These accounts were not signed by *James*—the others were: the fair inference, therefore, would be, that these accounts had not been recognized by him. As to the question whether these papers were material or not, that point is sufficiently disposed of by the authority of *Crease* v. *Barrett*, where the Court of *Exchequer* declared, that if the rule in *Doe* d. *Lord Teynham* v. *Tyler*, was acted upon to the extent stated in that case, the Court would, in a degree, assume the powers of a jury—a course which it is not at all proper should be adopted.

Cur. adv. vult.

Lord Denman, C. J., afterwards delivered judgment.—This was a rule for a new trial in a case in which the plaintiffs had brought debt for tolls. In order to prove that the plaintiffs had a title to the market, recourse was had to certain leases found among the muniments of their estate, and also to certain accounts of rents for the same market, found in the same place. Some of these were accounts signed by a person who was the steward of the plaintiffs' ancestor, wherein he charged himself with the amount of such rents, and to these no objection was made. Other accounts of the same nature were produced, signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to show that this person was ever employed by the steward, but the papers were tendered as speaking for themselves. They were severally objected to when tendered, but the learned judge admitted them in evidence. We are clearly of opinion, that they were not admissible, because they did not purport to charge the person whose signature they bore. We were, however, strongly urged to discharge this rule for a new trial (even though this evidence might have been improperly received), on account of the manifest preponderance of the proof arising from that evidence, which was not objected to. To induce us to adopt that course, the case of *Doe* d. *Lord Teynham* v. *Tyler*, in the *Common Pleas*, was strongly pressed upon us, founded, as it was, upon some former precedent, both in this Court and the *Common Pleas*. The same argument was urged in the Court of *Exchequer*, in a late case of *Crease* v. *Barrett*, where evidence had been improperly rejected, but the Court there answered, that it might be that the evidence thus improperly rejected might be readily explained, and might not weigh in the least against the other and strong evidence to which it was opposed; but they could not, upon that account, refuse to submit it to the consideration of a jury. *Parke*, B., who pronounced the judgment of the Court

The Baron de Rützen & Wife *v.* Farr. The Same *v.* Lloyd.

discusses the point at large, and a new trial was granted, because the Court could not say that if the evidence had been received, it would have had no effect with the jury, nor was it clear beyond all doubt, that if the verdict had been the other way, it would have been set aside as improper. In like manner, we are not convinced that the documents improperly admitted in the present case did not weigh with the jury in forming their opinion: or that their verdict, if given for the defendant, must have been set aside as against evidence. Upon this point, therefore, the rule must be made absolute, and we need not refer to the numerous other points that were debated.

Rule absolute.

The King *v.* The Inhabitants of Edge Lane.

INDICTMENT for not repairing part of a highway, leading from the township of *Oldham*, past or near *Dryclough*, in the township of *Royton*, towards and into the township of *Crompton*, the said part being situate in the district of *Edge Lane*, in the township of *Royton*, in the parish of *Prestwick cum Oldham*, commencing at a certain ancient highway there, leading from *Oldham* to *Rochdale*, and extending thence towards *Crompton* aforesaid, containing in length 1091 yards, and in breadth 12 yards. At the trial before *Gurney*, B., at the *Lancaster* Spring Assizes, 1833, a verdict was found for the Crown, subject to the following case:—The part of the road for the non-repair of which the indictment was found, is within the district of *Edge Lane*. This district has always repaired the highways within it, which would otherwise be repairable by the parish at large. The road indicted was made under the 45 *Geo.* 3, c. vii., intituled, "An Act for making and maintaining a road from *Hollinwood*, in the township of *Chadderton*, to *Featherstall*, in the township of *Hundersfield*, in the county palatine of *Lancaster*, and for making and maintaining several branches of road to communicate therewith." This act was repealed by the 7 & 8 *Geo.* 4, c. lv., intituled, "An Act for making and maintaining a road from *Hollinwood* to *Littleborough*, and other roads communicating therewith, in the county of *Lancaster*." The latter act contains a clause, that it shall be put in execution for the purpose (amongst others) of amending, widening, diverting, altering, repairing, improving, and keeping in repair the roads leading to *Dryclough*, through *Shaw*, *New Hey*, and *Milnrow* to *Rochdale*. The 7 & 8 *Geo.* 4, c. lv., was repealed by 11 *Geo.* 4, c. xcii., intituled, "An Act for improving and maintaining the road from *Werneth* to *Littleborough* and other roads communicating therewith, in the county of *Lancaster*," whereby it is declared, that it shall be put into execution for the purpose of (amongst other things) improving, repairing, amending, widening, diverting, altering, and keeping in repair the roads leading from *Werneth* by *Coppice Nook* and *Westwood* to *Uin Nook*, and for making, maintaining, and keeping in repair the proposed new line of road from, at, or near *Uin Nook* in *Oldham* to *Dryclough* in *Royton*; and also for improving, repairing, amending, widening, diverting, altering, and keeping in repair the road leading from *Dryclough* through *Shaw* to *New Hey*; and for making, maintaining, and keeping in repair the proposed new line of road from the then turnpike road

1. Where by an Act of Parliament trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public: therefore, where a portion only of the road is completed, the parish in which that portion is situated is not bound to repair it, although it has been used by the public, to whom it is of great utility, and has been before many times repaired by the parish.

2. It is the same thing where the road is made under the authority of subsequent Acts of Parliament, having distinct provisions and enactments for separate portions of the road, if it appears that the one common object of them all was to make one continuous line of road.

King's Bench.

The KING v. The Inhabitants of EDGE LANE.

at *New Hey*, to or near to *Littleborough*, by the said recited act authorized to be made; and also for improving, repairing, amending, widening, diverting, altering, and keeping in repair the branch road leading from *New Hey* through *Milnrow* to *Rochdale;* and also the branch of the road from *Goats* to *Grains* in *Crompton;* and also the branch road leading from *Bent Green* to *Middleton*. Many of these new lines of road, and the branch roads, are still unfinished, but some have been finished. The road now in question is part of that mentioned in the 7 & 8 *Geo.* 4, as leading from *Dryclough* through *Shaw*, *New Hey* and *Milnrow* to *Rochdale;* and also of the road mentioned in the 11 *Geo.* 4, as leading from *Dryclough*, through *Shaw*, to *New Hey*. The whole of this line of road was properly made and completed in 1806, from which time hitherto it has constantly been travelled over, and used as a public road from *Dryclough* and *New Hey*, at both of which places it joins other lines of public roads. Houses and cotton mills have been erected at the sides of it, and during the whole of this period, until the middle of 1832, the necessary repairs have been done to it by the respective parishes through which the road passes; and this road forms a communication between the several places through which it passes, and the public roads at *Dryclough*, *Shaw*, *New Hey*, and *Rochdale*. The want of repair, as stated in the indictment, is admitted by the defendants. The indictment, and the several Acts of Parliament mentioned in the case, and a plan agreed to by both parties, may be referred to, and used as part of the case.

Wightman (with whom were Sir *F. Pollock* and *Laurence Peel,*) for the Crown.—The question is, whether the inhabitants of a district through which a public road passes can defend themselves from liability to repair it, on the ground that some one or other out of a number of other roads connected with it has not been completed. If the whole formed but one line of road, made under the authority of one act, it might be so,—for such was in effect the decision in *Rex* v. *Cumberworth* (*a*). But that is not the case here. These roads were made under the authority of different statutes, and in several cases have different termini. They are altogether distinct and different roads, and any one of them being completed, the parishes or districts through which parts of it pass, at once become liable to its repair. But even *Rex* v. *Cumberworth* has been considered as carrying the law too far. That case was founded on *Rex* v. *Hepworth* (*b*); and in giving judgment in *Rex* v. *Cumberworth*, Lord *Tenterden* said, "This case is not distinguishable, in fact, from *Rex* v. *Hepworth*. If there had been no decision on the subject, I should have entertained some doubt." But, even taking the case of *Rex* v. *Cumberworth* as an unimpeachable authority, it does not decide this case,—for there the line of road was one entire line of road from one place to the other, made under one act, while here there are several different roads made under different acts. Then comes the case of *Rex* v. *Netherthong* (*c*). Till that case, it was doubtful whether, after the passing of a turnpike act, authorizing the levying of tolls, and creating a trust, the parish was liable at all; but that case decided that the tolls were only in aid of the funds raised from the parish, which was

(*a*) 3 Barn. & Adol. 108.

(*b*) Cited in argument in *Rex* v. *Cumberworth*, as decided by *Hullock*, B., at the *York* Lent Assizes in 1829.

(*c*) 2 Barn. & Adol. 179.

treated as primarily liable to the repair of a public road. There can be no doubt that the road in this case is a public road. The later acts relating to these lines of road treat it as such, and as such it has been treated by all parties. Adoption or dedication by the parish is no longer necessary. The doctrine was first stated in *Rex* v. *St. Benedict* (*a*); and again in *Rex* v. *Mellor*(*b*). [Lord *Denman*, C. J.—That doctrine may be considered overruled.] It was overruled in *Rex* v. *Leake* (*c*) directly, with reference to *Rex* v. *St. Benedict*, which was there fully brought under the notice of the Court. The case of *Rex* v. *The Justices of the West Riding of Yorkshire* (*d*) is not applicable to the present, for the only point for which it could be referred to here, is one which turns entirely on the use of the word "respectively" in one of the clauses, and that word is not found in any of these acts. In *Rex* v. *Haslingfield* (*e*), the usage of the defendants to repair the roads was taken strongly against them. Here there has been a usage to repair, and the question of mistake cannot arise, for it is not mentioned in the case.

Blackburne, for the defendants.—All the branches of the roads must be complete before any one can become a public road, and before the public can become liable to be charged with its repair. The argument on the other side amounts to this, that a road may become a public road before the persons who obtained the Act of Parliament have done what that act requires, in order to make it a public road. To adopt such a doctrine would be to overthrow one of the best established principles of the law with regard to the construction of this class of Acts of Parliament. In *Rex* v. *Croke* (*f*), it was distinctly laid down, that where, by statute, a special authority is delegated to particular persons affecting the property of individuals, it must be strictly pursued. *Rex* v. *Cumberworth* only followed up that principle, which was also distinctly recognised and adopted by Lord *Eldon* in *Blackmore* v. *The Glamorganshire Canal Company* (*g*), where he said, "It does not appear to me important to consider whether these iron works have or have not any right to the water, founded upon usage prior to the making of this canal, because I follow and adopt the expression of the Lord Chief Justice of the *King's Bench*, and I am glad to fasten myself, in some measure, on his great authority, and say, that when I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in any thing to be done under them, and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution." Again, he says, "Such Acts of Parliament have now become extremely numerous, and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." *Rex* v. *Hepworth*, which adopted

(*a*) 4 Barn. & Ald. 447.
(*b*) 1 Barn. & Adol. 32.
(*c*) 5 Barn. & Adol. 469.
(*d*) 5 Barn. & Adol. 1003.
(*e*) 2 Maul. & Selw. 558.
(*f*) Cowp. 26.
(*g*) 1 Myl. & Keen, 154.

King's Bench.

The KING v. The Inhabitants of EDGE LANE.

this principle, was not the first case declaring the rule now contended for. There had been another case at a previous Assizes at *York*, before Mr. Baron *Bayley*. The roads here are not different roads, but different parts of the same line of road; and though provided for by different acts, the object of all those acts is the same, and the last is but an adoption and an enforcement of the first. *Rex* v. *Cumberworth* has not been overruled, but is perfectly good authority; and the law, as there laid down, is exactly applicable to this case.

Wightman, in reply.—All these acts were not passed for the purpose of making one line of road, for two of them (7 & 8 *Geo.* 4, c. lv., and 11 *Geo.* 4, c. xcii.,) relate to keeping in repair the roads which have been made, and to making new roads. *Rex* v. *Cumberworth* requires to be reviewed. It is supposed, that under the authority of that case, a parish through which a public road of many miles in extent passes, and the benefit of which the parish has had for many years, is not to be held liable to repair it, because 100 yards of that road, at its very extremity, have not been completely finished. No such monstrous proposition can be contended for. Besides, here the defendants have repaired this road for many years, and their own acts are evidence against them.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of the term (1st *Feb.*), delivered judgment.—It appears, from the special case, that in 1805 an act passed (45 *Geo.* 3, c. vii.), "For making and maintaining a road from *Hollinwood*, in the township of *Chadderton*, to *Featherstall*, in the township of *Hundersfield*, in the county palatine of *Lancaster*, and for making and maintaining several branches of roads to communicate therewith." The principal line of road, therefore, is by the title of the act described to be from *Hollinworth* to *Featherstall*. And in the preamble it is recited, that the said principal line with four branches would be of great benefit and advantage to the inhabitants of the adjacent country, which is described as being—and is well known to be—"very populous and manufacturing,"—*Oldham* and *Todmorden*, amongst other places, being specified. This act was repealed by another, passed in 1826, (7 & 8 *Geo.* 4, c. lv.,) which somewhat varied the line at the *Hollinwood* terminus, and substituted *Littleborough* for *Featherstall*, as the terminus at the other extremity. The variation, however, in this particular, is but trifling (as appears by the plan forming part of the case), and the direction of the line to *Littleborough* leads to the same tract of country as the original one to *Featherstall*. The second act was repealed by an act of 1830, (11 *Geo.* 4, c. xcii,) which made *Werneth* the terminus instead of *Hollingwood*, but left the rest of the line to *Littleborough* substantially the same, so far as the question before us is concerned. It follows, from this short statement, that the original purpose of communication, as expressed in the first act, is continued into the last, which is the existing act. It further appears, that at each extremity parts of the road (which together amount to near half of the whole line) have not been made. And the question is, whether this indictment against the inhabitants of *Edge Lane*, which is situated about the middle of the line, can be supported. The state of authority upon this question supersedes, in our opinion, the necessity for much discussion.

We would observe, however, that the remarks of Lord *Eldon* in *Blackmore* v. *The Glamorganshire Canal Navigation* (*a*), considering his high authority and undoubted caution, have great weight. We also think, that where powers are entrusted by the legislature for an avowed and precise object, the pursuit and performance of that object should be rigidly watched. It by no means follows that the Act of Parliament for making the roads could have been obtained, if the communication had been less—and in consequence the accommodation to the public less—than that averred and professed by the preamble of the original act. These observations, however, and others of a similar import, are rendered superfluous, because they are expressly the foundation of a judgment of this Court, with the reasons for which we are satisfied, and by which we mean to abide. In *Rex* v. *Cumberworth* (*b*), a certain part, and, compared with the present, a small part, of the projected road was incomplete; and for that reason an indictment against the inhabitants of *Cumberworth*, for not repairing a portion of the line, was held not sustainable. We think, in the present case, the like consequence should follow.

Judgment for the defendants.

(*a*) 1 Mylne & Keen, 154. (*b*) 3 Barn. & Adol. 108.

The KING *v.* BOXALL and others.

Where several parties are indicted, any one or more of them may remove the case by *certiorari*, upon entering into recognizances under the statute 5 & 6 *Will.* 4, c. 33, for himself or themselves alone.

THIS was an indictment against thirty-three defendants, who were stage-coach and omnibus proprietors, and their servants, charging them with a conspiracy to drive the prosecutor, also an omnibus proprietor, off the road. Two of these defendants obtained a writ of *certiorari*, on the order of *Littledale*, J., to remove the indictment from the *Central Criminal Court*, and entered into the recognizances required by the statute 5 & 6 *Will.* 4, c. 33, s. 2.

Clarkson now moved for a *procedendo*.—The very evil which it was the intention of the 5 & 6 *Will.* 4, c. 33, to prevent, will happen if this *certiorari* be permitted to stand. The effect of it is to put an end to the indictment in the Court below as against all the defendants, whilst two only have given security to take their trial in the Court to which the indictment is removed. Those very persons thus put forward by the rest may be the most innocent, or perhaps, being quite innocent, may be acquitted; and thus, as the others may not come in to stand a trial, the whole may get off, however guilty, without any punishment.

Lord DENMAN, C. J.—The practice is, that any one defendant out of many may apply for a *certiorari*, and the circumstance of the recognizances of the rest being discharged, is something which the learned judge who heard the application must have considered with reference to the propriety of granting or refusing the application. I cannot but observe, however, that a prosecutor who thus unites thirty-three persons in one indictment, has no right to complain of such an application being granted. I can hardly see how thirty-three persons, included in one indictment, can be tried fairly: and

King's Bench.

The KING v. BOXALL and others.

there could be no object in including so many but that of making the acts of some operate to procure the conviction of the others. I see no inconvenience likely to follow from this proceeding, except such as must be expected from the plaintiff having preferred so voluminous an indictment.

LITTLEDALE, J.— The statute gives no power to the judge to take recognizances on account of any but those defendants who apply for a *certiorari*. I had no alternative but to grant or refuse the *certiorari*. I could not impose conditions on the other defendants. I once indeed took that course, but upon inquiry at the office I found that it was not warranted by the usual course of practice.

WILLIAMS, J. concurred.

Rule refused (*a*).

(*a*) The Court will grant a *certiorari* to remove an indictment from the *Old Bailey*, if it clearly appear that the psosecution is malicious; 4 Hawk. P. C. ss. 26, 27; *Anonymous*, 1 Salk. 144; and *Nehuff's* case, id. 151.

JOHN SEATON, HENRY EDWARDS and HESTER his Wife, and MARY SEATON, *v.* BOOTH.

1. A person devised specific property to his son, and other specific property to his daughters as tenants in common. The several devisees agreed to a sale, and both properties were sold to one person in several lots, partly by auction and partly by private contract, but each sale was subject, amongst others, to a condition "that in case the purchaser should be let into possession before the payment of the purchase-money, he should be considered as tenant at will to the vendors, and pay interest after the rate of *4l.* per cent. per annum on the amount of the purchase-money, as and for rent. The defendant was let into possession:—*Held*, that each sale was a separate and distinct contract, and that a count stating only one entire contract with the devisees jointly for the whole property, was bad:—*Held*, also, that the devisees, having separate interests, could not maintain a joint action for use and occupation, on the mere fact of the defendant having been let into possession.

2. *Quære*, whether in such a case use and occupation is maintainable at all? Per *Littledale*, J.

ASSUMPSIT. First count, to recover from the defendant, who had been let into possession as the purchaser of an estate from the plaintiffs, a sum of money, by way of interest on the purchase-money, under a condition of sale, by which it was agreed, "that in case the purchaser should be let into possession before the payment of his purchase-money, he should be considered as tenant at will to the vendors, and pay interest after the rate of *4l.* per cent. per annum on the amount of the purchase-money, as and for rent." There was also a count for use and occupation. *Plea: non assumpsit.* At the trial before Lord *Lyndhurst*, C. B. at the Summer Assizes at *York*, in 1834, it appeared that four houses, in respect of which this action was brought, had been sold by auction to the defendant; that one of the plaintiffs, *Hester Edwards*, formerly *Hester Seaton*, was a married woman, who with her brothers and sister had become entitled to these and other houses under the will of *Gervas Seaton*, their father, who had devised specific parts to his son *John Seaton* in fee, and other parts to his two daughters *Mary Seaton* and *Hester Seaton* in fee, as tenants in common and not as joint tenants. The devisees sold all the houses to different purchasers. The sales took place at different times, but were under the same conditions of sale, which stipulated, that the conveyances should be executed, and the purchase money paid on a given day; but that in case the purchaser of any lot was let into possession of the premises before the payment of the purchase money, he should be considered as a tenant at will of the premises to the vendors, and should pay interest at the rate of *4l.* per cent. per annum on the purchase-money, "as and for rent." The defendant, on 4th *February*, 1828,

became the purchaser of two lots at a sale by auction, and subsequently, on the 16th *February*, 1828, he purchased two other lots by private contract. He was let into possession of all the premises he purchased before payment of the purchase-money, and remained for between five and six years in possession, but neither paid interest nor rent. An objection was taken at the trial to the first count, that it set out the transaction as if it had consisted of one single purchase; whereas it was proved in evidence that the defendant had become the purchaser of the houses in two lots under a private contract, and in two lots by a public sale, so that each of the four conditions of sale applicable to each purchase ought to have been stated. It was also objected to the second count, that an action in that form was not maintainable under the particular circumstances of this case. A third objection was taken on the ground of misjoinder of parties, because *Hester*, the daughter of the testator, and the wife of *Henry Edwards*, was joined with her husband as one of the plaintiffs. Upon the first objection, *James* v. *Shore* (*a*) was cited at the trial. It was there held, that where different lots are sold at an auction for different sums, the contracts are separate both in law and fact; but the learned judge distinguished that case from the present, on the ground that there the purchase was of the essence of the contract, whereas here it was only matter of inducement; and that the main fact here, was the letting the defendant into possession, for which the plaintiffs claimed compensation. A verdict was taken for the plaintiffs, but leave was reserved for the defendant to move to set it aside and enter a nonsuit, or have a new trial. A rule for a nonsuit or new trial having been accordingly obtained,

Alexander and *Wightman* showed cause.—This action is maintainable in its present form. The contract of purchase is not the essence of the action, nor is it the condition under which the defendant was let into possession. It is only alleged by way of inducement. The action is in respect of a letting into possession, which was undoubtedly done by all the plaintiffs, whatever might be the interest which each separately had in the premises. This distinguishes the case from that of *James* v. *Shore* (*b*). *Kirtland* v. *Pounsett* (*c*) is not an authority against the claim of the plaintiffs for rent in this case, for there the seller had the purchase-money, and it was his default that the title was not completed. Here the purchase-money has not been paid. All the cases which appear to be opposed to the plaintiffs' claim are cases where there was no beneficial occupation. Here the occupation has been beneficial. This action is maintainable under the provisions of 11 *Geo. 2*, c. 19, s. 14, the object of which was, that where a person was let into possession of a house without a deed, or under circumstances where covenant would not lie, rent might be recovered from him as for use and occupation. But here the case is still stronger than is supposed in that statute, for here is an express condition that the party shall pay interest "as and for rent." It is impossible to say that use and occupation will not lie against a party who has made such a contract. In *Hull* v. *Vaughan* (*d*) it was held, that use and occupation lay against the original vendee, who had been let into possession under a mistake as to the fact. *Saunders* v. *Musgrave* (*e*) is to the same

(*a*) 1 Stark. 426.
(*b*) Ib.
(*c*) 2 Taunt. 145.
(*d*) 6 Price, 157; Peake, 254, *S. C.*
(*e*) 6 Barn. & Cress. 524.

effect. The case of *The Dean and Chapter of Rochester* v. *Pearce* (*a*) shows that an actual demise is not necessary to create a tenancy. As to the supposed misjoinder of Mrs. *Edwards*, the estate was by her father's will left to her sister and herself, as tenants in common and not as joint tenants. She therefore brought the property to her husband in her own right, and it would go to her heirs. She had therefore a perfect right to join in the suit with her husband. The premises were put up to auction as the property of all these vendors, without any distinction being made as to their separate interests in any part. Having once recognized the rights of all these parties, the defendant cannot now deny them. In *Nurse* v. *Wills* (*b*), the interest of the wife being shown in the introductory part of the declaration, it was held sufficient after verdict to support a promise to her and her husband in respect of that interest, or that, at all events, the averment of her interest might be rejected as surplusage; and the count was held good. In *Willy* v. *Hawksworth* (*c*) it was held, that husband and wife seised of land in right of the wife, might join in trespass *quare clausum fregit*, for taking away the grass off the land. So in *Aleberry* v. *Walby* (*d*) it was held, that the husband and wife might or might not join in an action of covenant on a lease at will. So in *Fosdyke* v. *Stirling* (*e*), it is said, that whenever the action would survive to the wife, she may join, but where the interest is the wife's, she must join. The case of *Nurse* v. *Wills* came before the Court of Error (*f*), and the judgment of the Court below was affirmed. [*Coleridge*, J. The objection is not, that the wife had not a joint interest in part, but that she had not a joint interest in the whole estate, and then the question will come to the effect of the agreement alone.] The contract is here made with the vendors, whoever they were, and it clearly appears that Mrs. *Edwards* was one of them. If the husband had died, the benefit of the contract would have survived to her, and therefore she was bound to sue.—[*Coleridge*, J.—It is admitted that all the plaintiffs have not a joint interest under the will.]—Still the contract is with the vendors generally, and not with each of them, in respect of the particular interest of each. By that contract the defendant is bound.

Sir *F. Pollock*, in support of the rule.—There are in this case four special contracts for the payment of four per cent. interest on the purchase-money of each set of premises, during the time that the defendant is in possession, and before the purchase is completed, by the delivery of a good title and the payment of the purchase-money. These four contracts cannot be made the subject of one count. The vendors are entitled to remuneration for the use of their premises under the condition of sale, and in no other way. That condition did not create the relation of landlord and tenant, and the 11 *Geo. 2*, cannot be imported by the Court into such a contract. The different portions of this property were not all bought in the same way, and those purchased by private contract, and those purchased by public auction, cannot be blended together in this manner. *James* v. *Shore* (*g*) is an express authority, and is not distinguishable from the present case. There was here no joint interest

(*a*) 1 Camp. 466.
(*b*) 4 Barn. & Adol. 739; *S. C.* in error, 1 Adol. & Ell. 65.
(*c*) Selw. N. P. 275, 7th ed.
(*d*) 1 Str. 229.
(*e*) 1 Freem. 36.
(*f*) 1 Ad. & Ell. 65.
(*g*) 1 Stark. 426.

under the will, and the agreement between the parties was in effect, that they should make sale according to their respective interests. [He was stopped.]

Lord DENMAN, C. J.—I do not think it necessary to say more than that this case depends entirely on the allegation of a joint contract between the parties. Putting out of view the question of the wife's interest, can I find more than that these three parties have directed a man to make a sale of some property. What is there to make them jointly interested? I understood that this condition was alleged by way of inducement. If it was so, then the statement in the declaration would be wholly immaterial. The parties must then proceed on a new contract; but there is no new contract between all these parties jointly. I am therefore of opinion that this action is not maintainable, and that the rule for a nonsuit must be made absolute.

LITTLEDALE, J.—I am entirely of the same opinion. It appears that *John Seaton* had a separate interest from that of the other two parties under the father's will. The conditions of sale do not disclose any new contract. If the parties sold their lots separately, they cannot afterwards join in an action for use and occupation, unless they can show a new contract between the defendant and all the three parties together. The declaration alleges, that all three had entered into a contract of sale of the estate, that the defendant was let into possession, and in consideration of the premises he promised to pay four per cent. There is no evidence of any agreement of that kind. If there had been, that would have been a different consideration. The first count alleges a performance of the condition on the part of the sellers. That would furnish evidence to maintain an action at law on the first and only real contract between the parties. The law will not imply a promise of this kind, unless there is a contract, and a contract of this sort by parol would be void. No implied contract can arise on the circumstances here. The remedy of the parties must be in equity. It appears to me that this undertaking to pay four per cent. interest on the purchase-money, implies that the conveyance should be executed on the day given, which would be an executed consideration. Whether the parties choosing to take possession of the premises when the contract was incomplete, by the conveyances not being executed and the money paid, would of itself make a new contract to pay four per cent. interest on the purchase-money, is quite another question. After all, it does not seem to me that use and occupation will lie, for this is a special contract to pay four per cent. on a given sum of money, though it is at the same time in the nature of a tenancy. *Naish* v. *Tatlock* (*a*) was an action against an assignee for use and occupation in respect of the bankrupt's occupation before the bankruptcy, as well as for that of the assignee afterwards; and it was held, that the occupation by the bankrupt could not be alleged as at the request of the assignee, without proof being given that it was at the assignee's request. I quote the case, however, chiefly for the observation of Lord Chief Justice *Eyre* in giving the judgment of the Court (*b*):—"The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy." This is not a remedy sought by the landlord, but by the seller of the estate.

(*a*) 2 Hen. Bl. 319. (*b*) Ibid. 329.

King's Bench.

SEATON and others v. BOOTH.

It seems to me that the plaintiffs have not adopted the proper form of action. They ought to have declared specially in some manner which could be brought within the real circumstances of the case. In the first place, *John Seaton* had a different interest from the rest; in the next, there was not a new contract for doing any thing before completing the purchase, and therefore the first count is bad. The second count is bad for the reasons which I have already mentioned.

WILLIAMS, J. concurred.

COLERIDGE, J.—I am of the same opinion. With respect to the second count, there is no evidence to enablethe jury to infer that there was such a consideration or such a contract as is therein stated. There may be circumstances in which a special contract may be implied, without being expressed in terms, but that is not the case here. Then it is said, that these four plaintiffs are entitled to maintain use and occupation against the defendant, on the ground that he came into possession, in the first place, under a certain contract of sale, to which the vendors were one entire party and he the other, and that, having had possession under them, they are entitled to sue him for use and occupation. I do not think it necessary for the Court, on this part of the matter, to examine into the case. On that particular branch of the law there may be some difficulty in reconciling contradictory decisions; but if this special contract does exist, we must see the evidence from which that existence is to be inferred. Here is a person, a defendant, occupying the land, and occupying it, as it is said, under these plaintiffs. That occupation must result from some interest which the four plaintiffs have in the land, or from some contract entered into with them. As to the claim of title by all four jointly, there is no foundation for that; it is clear, that as far as that is concerned, the right of the plaintiffs to maintain the action is at an end. Then comes the contract, without naming the title of the parties. About that there is only this circumstance clear, that the defendant undertook to become the purchaser of the property. The case is something like that of *Emmerson* v. *Heelis* (*a*), where it was held, that if on a sale by auction the same person is declared the highest bidder for several lots, a distinct contract arises for each lot. But it is not necessary here to go the length of that case, for there is no evidence here of such a contract. Here the contracts were clearly separate. From what is it that we are to infer one entire contract? It is said, that there is a condition as to failing to make a title on a given day. They do fail to make the title on that day, but subsequently the defendant takes possession. It is then said, that we must then look at the conditions, and we shall find that he enters into possession in consequence of the title not being made on the particular day, and that his possession is under a condition connected with the circumstance of the not making a good title. If the taking possession is referable back to the not making title, I agree that it is done under a particular condition. But that would then be a possession under four different contracts. It is true, that he comes into possession under these vendors, but when we look at the nature of that possession, at the nature of the contract itself, or at the possession afterwards enjoyed under it,

(*a*) 2 Taunt. 38.

we see nothing to induce us to say that it was under a joint interest possessed by these vendors that he was so let into possession.

Rule absolute for a nonsuit.

The KING *v.* The Inhabitants of HARRINGTON.

An indenture of apprenticeship bore date in *June*, 1813, but was not in fact executed till two years afterwards: *Held*, that this indenture was not, on that account, made void by the provisions of the 9 *Anne*, c. 9, s. 35 & 39, and 5 *Geo.* 3, c. 46, s. 19, so as to prevent the apprentice from gaining a settlement, there being in neither statute any express provision that the omission to insert the true date should avoid the indenture.

ORDER for the removal of *Robert Cooke*, his wife and four children, from *Manchester* to *Harrington*. On appeal the Sessions confirmed the order, except as to one child, who was born a bastard, subject to the opinion of the Court on the following case:—"The pauper, *Robert Cooke*, had a derivative settlement from his father in the appellant parish of *Harrington*, and had gained no settlement elsewhere in his own right, unless he gained one by service under an indenture of apprenticeship, under the circumstances hereinafter recited. In *June*, 1815, the pauper, *Robert Cooke*, was bound apprentice by indenture to one *Michael M'Graa*, a ship-smith, in *Workington*, for the term of six years. The indenture was a printed form filled up, and had at the foot of it the notice required to be added to all such printed forms, by 5 *Geo.* 3, c. 46, s. 19 (*a*). The indenture bore date the 13th of *June*, 1813, but was not executed in point of fact until the latter end of *June*, 1815; it was properly stamped, and in all other respects, except as to its being ante-dated, was perfectly regular, and the pauper served his master under it between two and three years, and gained a settlement by such service in a third parish, provided a settlement could be gained by service under this indenture. But the Court of Quarter Sessions held, that the indenture, by reason of its being so ante-dated, was absolutely void, and that no settlement could be gained by service under it.

Wightman, in support of the Order of Sessions.—The general object of these two statutes is to secure the correctness of all the statements in the indenture, and thus to protect the revenue. If this indenture is good, the object of the statutes will be defeated. The provisions of the statute of *Anne* are clear, and must be strictly followed. In *Slade* v. *Drake* (*b*) it is said, that "the rule is, that affirmatives in statutes that introduce new laws do imply a negative of all that is not in the purview." This is an affirmative statute, and the intention of the legislature is fully shown by the statute which succeeded it, so that if there had been any doubt, under the former statute, whether the

(*a*) By the 8 *Anne*, c. 9. s. 35, it is enacted, "that the full sum or sums of money received, &c. shall be truly inserted and written in some indenture, which shall contain the covenants, &c., and shall bear date upon the day of the signing, sealing, or other execution of the same," under a penalty therein stated. By the 39th section it is declared, "that all indentures wherein shall not be inserted the full sum or sums of money received, or whereupon the duties payable by that Act shall not be duly paid, &c. shall be void." By the 5 *Geo.* 3, c. 46, s. 19, notices are required to be printed at the foot of all printed indentures, and if the printer sells any indenture without the notice thereby required, the Act declares that he shall forfeit 10*l.* One of the directions contained in the notice is in these terms: "The indenture must bear date the day it is executed, and what money is given must be inserted, and the duty paid at the stamp office, &c. otherwise the indenture will be void, the master or mistress forfeit 50*l.*, and another penalty, and the apprentice be disabled to follow his trade or be made free."

(*b*) Hobart, 295—298.

King's Bench.

The KING v. The Inhabitants of HARRINGTON.

date must be inserted, that doubt was sufficiently removed by the *5 Geo.* 3, c. 46, s. 19. The two statutes must be taken together, and then it appears that what might have been perhaps considered to be omitted in the first of them was amply supplied in the second; and the provisions for enforcing obedience to the directions in the first, must be considered engrafted on the second.

Armstrong, contrà.—The only statute under which this indenture could be void would be that of the 8 *Anne*, c. 9. But that statute does not make it void for not having the date truly inserted. On the contrary, the 39th section selects from several things directed by the 35th section to be done—that one which relates to the insertion of the true amount of the sums paid, and that which relates to the payment of the duty, and declares, that, if its directions are not followed in these two respects, the indenture shall be void. If other things are omitted a like consequence will not follow, for *expressio unius est exclusio alterius.* The 19th section of the *5 Geo.* 3, requires the printer who prints these indentures, to print at the foot of them the notice there mentioned, and it imposes a penalty on him for not doing so, but it does not go on to say that the indenture shall be void if that notice is not printed. The Court must, therefore, recur to the statute of *Anne*, and in that statute nothing will be found making the indentures void if the date is not truly set forth in the instrument.

Lord DENMAN, C. J.—It is contended that no settlement has been gained by service under this indenture of apprenticeship, because the indenture was void by the statutes of 8 *Anne*, c. 9, and *5 Geo.* 3, c. 46. Now, certainly, by the statute of *Anne*, the deed is not avoided by reason of the omission to insert the day upon which the instrument was really executed. The Act imposes a penalty on the master if the sum received is not truly stated, but it stops there. In a subsequent part of the same statute other contraventions of its provisions are mentioned and forbidden, and we cannot carry the words of the statute beyond what they specially point out as reasons for avoiding the deed. By the *5 Geo.* 3, c. 46, s. 19, all printed indentures are required to have a particular notice printed under them, containing directions to the parties as to what is required by the Act to be inserted in the deed. One of these is a notice that the indenture shall bear date on the day it is executed. This Act was an Act for altering the stamp duties, and, in order to secure the due payment of the stamp duty, it required that the party who entered into the contract of apprenticeship should be told what he was required to do. It directs, among other things, that he shall be told that the indenture must bear date the day it is executed, but there is nothing in that Act making an indenture void by reason of its bearing a wrong date.

LITTLEDALE, J.—It seems to me that the indenture was not void so as to prevent the party from gaining a settlement under it. The 35th section of the statute of *Anne* requires that the indenture should bear date upon the day of the signing, sealing, and delivering; that the sum paid should be truly stated; and that the stamp duty should be paid; and imposes a penalty on the master for not truly stating the sum received, but does not make the indenture void in case its provisions about the date are not

complied with. It particularly appears, by the 39th section, in what cases of default the indenture shall be void. This is not one of the defaults specified. The 8th of *Anne*, therefore, does not make this indenture void. Then with regard to the 5th *Geo. 3*, that does not render the indenture void, where all the provisions specified in the notice are not complied with. It imposes a penalty on the printer, if he shall sell any printed indenture without the copy of the notice thereby required, but it makes no other provision to secure obedience to its directions. It is *in terrorem* merely.

WILLIAMS, J., and COLERIDGE, J., concurred.

Order of Sessions quashed.

DOE *d.* The Governor and Company of the BANK OF ENGLAND *v.* CHAMBERS.

EJECTMENT. The declaration contained two counts on two separate demises; the first on the 1st *January*, 1833, and the second on the 1st *January*, 1834. At the trial before *Patteson*, J., a lease was produced, to which was affixed the corporate seal of the *Bank of England*. Immediately around the seal were the words, "Sealed by order of the Governor and Directors of the Company of the *Bank of England*," and then there was the signature "*James Knight*, Sec^ry." It was proved that this was the seal of the *Bank of England*, but Mr. *Knight* was not called as a witness. It was contended that the words around the seal must be construed to be an attestation of the execution of the instrument, and that Mr. *Knight* was, therefore, the attesting witness, and ought to be called. A verdict was taken for the plaintiff on the first count, and for the defendant on the second count; but leave was reserved to the plaintiff to move to enter a verdict and judgment on the second count, if the Court should be of opinion that the words surrounding the seal were not an attestation of the execution of the lease. Speedy execution was granted by the learned judge, on the verdict for the plaintiff on the first count. A rule was afterwards obtained to enter a verdict for the plaintiff on the second count.

1. A deed having on it the seal of the *Bank of England*, and immediately round the seal the words "Sealed by order of the Governor and Directors of the Company of the *Bank of England*," and the signature "*James Knight*, Sercetary," was produced in evidence. The seal was verified; but Mr. *Knight* was not called, nor his absence accounted for: *Held*, that the above words were not to be considered as an attestation of the execution; and, therefore, that it was not necessary to call Mr. *Knight* as an attesting witness.

2. Where in ejectment on two demises in separate counts, a verdict was taken for the plaintiff on one, and for the defendant on the other, with leave to move to enter it for the plaintiff on a point of law, and speedy execution was given to the plaintiff:—*Held*, that his having accordingly issued execution on the first count, was no bar to his also having judgment on the other.

Erle, before showing cause, said,—There is a preliminary objection which must first be disposed of. The plaintiff has already taken out execution on the first count, and, having done so, cannot go further and have execution on the second count, which is on a demise inconsistent with the first. The execution on the first must be treated as an estoppel as to the other.

Per Cur.—That cannot be so considered under all the circumstances of this case. The plaintiff is entitled to judgment on one or the other of these demises. He obtained immediate execution as to the first, on which he obtained a verdict at the trial; but the learned judge having reserved to

him the right of moving to enter a judgment on the other, he is now entitled to come to the Court, and to have his judgment on the other demise also. The case may, therefore, be confined to the question, "Whether Mr. *Knight* was or was not an attesting witness?"

Erle then showed cause.—It is clear that Mr. *Knight* was an attesting witness. The instrument derives its authority from the attestation of this seal. The placing of the seal there was the execution of the instrument. On the face of this instrument, and of the seal, therefore, Mr. *Knight* is referred to as the person who knows, and can testify, that the instrument was executed. —[*Littledale*, J.—Suppose that Mr. *Knight* executed the instrument under a power of attorney, his name would appear, but he would not be an attesting witness. Is he not here the person who puts the seal to the instrument?] —He is not necessarily so. He may be, but that was not proved. There is no particular privilege enjoyed by the Bank as to the execution of instruments, and Mr. *Knight* here must be taken to have attested the due execution of this lease; it was, therefore, necessary that he should be called as a witness.

Sir *W. Follett*, in support of the rule.—It is a rule of law, that, as to deeds executed by corporations, all that is necessary to be proved is, that the seal affixed is the corporate seal. It is never necessary, with respect to such documents, to call an attesting witness to prove any thing else; the corporation does not prove the fact of affixing the seal, as is the case with a private individual. The words here do not mean, that Mr. *Knight* saw any other person affix the seal to this instrument. The seal must be affixed by the corporation, or by some officer of it. Mr. *Knight* could not attest his own affixing of the seal as the officer of the corporation.—[Lord *Denman*, C. J.—He must attest the act of some other person. Suppose a master desired a clerk to draw a bill, would the clerk be a witness to the drawing of the bill?]—If he put his name in the corner he might be so; but the case most like the present would be one where one man authorized another to draw or accept a bill, and the latter accepted "*per procuration*," and signed his own name. He would not become an attesting witness, whom it would be necessary to call, for the purpose of proving the drawing or acceptance. There is an execution of this instrument in the regular way by this corporation, but no attestation of the execution, nor any necessity to call Mr. *Knight* as a witness to prove it.

Lord DENMAN, C. J., after describing the seal and the words around it, said—Supposing that these words were an attestation of the act done, I do not say that the plaintiff would not be obliged to call the person who had attested it; but I think that we cannot draw that inference from the form of the memorandum. This appears to be a mere memorandum to show that what Mr. *Knight* did, was done by the order of the Governor and Company of the *Bank of England*, and not an attestation of the execution of the instrument by them.

LITTLEDALE, J.—When a corporation affixes its seal to an instrument, it is impossible for all the members to do it, for they are an aggregate

body. The act must be done by one of their officers. It was so here. He is the person who put the seal on the instrument. He did not witness the putting of the seal there; he merely said, that he was the person who was deputed by the corporation to put their seal there.

Williams, J.—There is nothing on the one side, or the other, but this short description, to lead to any opinion on the subject. This seems to have been considered similar to the case of a bond with an attesting witness: and, assuming it to have that character, the objection was taken at the trial that the attesting witness should be produced. But that was an assumption that the state of facts did not authorize. I should rather infer that Mr. *Knight* was the person who impressed the seal upon the instrument, than that he somewhat unnecessarily attested the putting of the seal there. The objection, therefore, does not arise.

Rule absolute.

Devaux *v.* Salvador.

Assumpsit upon two policies of insurance effected by the plaintiff as agent for the owners, on the ship *La Valeure* of *Havre*, belonging to Messrs. *Dupins*, Brothers. At the trial before Lord *Denman*, C. J., at the *London* sittings after last *Michaelmas* term, it appeared that the policies were time policies; the first being dated on the 20th of *July*, 1829, to continue till the 19th of *July*, 1830; and the second from that period to 19th *July*, 1831. The loss was, under each of these policies, alleged to have arisen from perils of the sea. The ship was built in *France* in 1808, but, owing to the war, was laid up till 1816, when, after having been fully overhauled and repaired at an expense of 1300*l.*, it was employed upon a voyage. From that time to the period of the voyage made under the policies in question, it was constantly employed, and had never been the subject of any claim on the underwriters. The present policies were effected with the intention that the ship should go on a voyage to *India* and back. It sailed from *France* in 1829, reached the Isle of *Bourbon*, went to *Pondicherry*, took on board a number of *Indians* intended to act as labourers in the Isle of *Bourbon*, but meeting with adverse weather in its passage, it was compelled to put back to *Calcutta*, where its crew and cargo were disembarked, and the vessel underwent a thorough repair. It then dropped down the *Hooghley*, and accidentally struck against a steam-vessel—the *Forbes*—was again repaired, again set sail, again met with very tempestuous weather, and after beating from place to place in the *Indian* Seas, was taken into *Pondicherry*, was there surveyed and found to be unfit to be repaired so as to continue the voyage, and was consequently sold; and while in the hands of the purchaser went to pieces. The captain had been required to pay one half of the damage suffered by the steam-vessel, which had been injured by his ship running against it, and in order to avoid a threatened detention of his vessel, he had paid the money. The abandonment took place after every effort had been made to repair the ship, and the assured claimed for an average loss, on account of the repairs at *Calcutta*, within the terms of the first policy, and for a total loss on the second policy. A portion of the claim made as for an average

1. Where an insured vessel strikes against another without either being in fault, and both suffer damage from the collision, and the amount of the gross damage is divided between them, and half of it paid by the captain of the insured vessel, in order to avoid detention in a foreign port, such payment cannot be recovered from the underwriters as a partial loss.

2. Where an insured vessel puts into port to be repaired, and the seamen belonging to the ship assist in such repairs, the amount of their wages and provisions during the repairs cannot be recovered from the underwriters; though, if they had not assisted, other persons must have been employed for that purpose.

loss under the first policy, consisted of the wages and provisions of the seamen during the time that the repairs were going on, they having worked at the ship while in dock at *Calcutta*. Another portion was made up of the money which the captain was obliged to pay to the owner of the steam-ship injured by *La Valeur*, when the latter was dropping down the *Hooghley*. The jury returned a verdict for the defendant, on the ground that the claims for seamen's wages during the repairs, and for contribution to the damage done to the steam-ship, could not be supported, and that the final loss had occurred from ordinary wear and tear, and not from the perils of the sea.

Maule, in pursuance of leave given, moved to set aside the verdict, and enter a verdict for the plaintiff, or have a new trial. The claim for a general and particular average on the first policy, and for an average, and also for a total loss on the other, ought to have been admitted. The first principles of the law relating to shipping are in favour of the right of the plaintiff to recover. By the laws of *Oleron* it is declared, that if any ship, while upon the voyage, incurs damage by running against another ship then at anchor, the whole damage shall be divided between the owners of the respective vessels. It has always been considered that this was good law, and the owner of the steam-ship, the *Forbes*, insisted upon payment, and threatened to detain the ship, if payment was not made. The master was therefore acting for the benefit of all concerned when he paid that which was a legal demand, and might have been enforced by process of the Courts of the country where the ship then was. He was not bound to wait till his ship was actually stopped by an *Admiralty* process.—[*Littledale*, J.—You say that there was a threat to detain the ship; and that, as that threat might have been executed, the proper course was to pay the money, and so prevent the voyage from being interrupted.]—That is the ground on which the plaintiff contends that the payment thus made is recoverable from the underwriters. The seamen's wages and provisions are also properly recoverable. They performed labour during the repair, which must otherwise have been performed by other people, and must then have been paid for, and the expenses of the repairs would have been so much larger. To that extent, therefore, the underwriters have been benefited (*a*). The only case in which it has been held, that, under such circumstances, wages cannot be recovered, is that of *Fletcher* v. *Poole* (*b*), but that was a mere ruling at *Nisi Prius*, and has never since been properly considered. All these claims the jury improperly rejected, and the plaintiff is entitled to a new trial.

Cur. adv. vult.

Lord DENMAN, C. J., subsequently (30th *January*) gave judgment.—In this case a new trial was moved for, on the ground that both the claims made in respect of the demand for the average loss had been improperly rejected, and ought to have been taken into account. We think that the claim in respect of wages ought not to have been taken into the account at all. As long ago as 1769, in the case of *Fletcher* v. *Poole* (*c*), this point was decided against the claim by Lord *Mansfield* at *Nisi Prius;* and the doctrine there laid down was afterwards fully recognized in *Robertson* v. *Ewer* (*d*). The

(*a*) Abbott on Shipping, p. 350, last edition.
(*b*) Cited 1 Term Rep. 131.
(*c*) Cited 1 Term Rep. 131.
(*d*) 1 Term Rep. 127.

facts of the last case did not, however, require the application of the doctrine, and Mr. *Maule*, therefore, says that it rests on the single authority of Lord *Mansfield* at *Nisi Prius:* but when we consider what a great master he was of insurance law, and when we find that his opinion was afterwards, as in *Robertson* v. *Ewer*, directly adopted by Mr. Justice *Buller*, and has been since treated as settled by distinguished writers upon that law; and when we recollect, too, that there has not been one claim inconsistent with it during a long period of years, though the circumstances which would have given rise to such a claim must often have occurred, we think we may safely say that the doctrine of Lord *Mansfield* is fully established. The other point is new, and that makes it a matter of even less doubt than the other, for the circumstance which gave rise to it must have been one of frequent occurrence. That point is, how far it is fitting, when an insured ship is driven against another by the force of the tide or the weather, and injury has arisen from the collision; and when the ship insured has received some damage, and neither of the vessels is in fault, and when the insured ship has paid part of the damage sustained by the other, that the insurer should be entitled to recover that payment from the underwriters. The rule is said to be, that the amount of the two losses should be added together, and then divided. Upon that rule it is clear that the insured ship might have to pay for more damage than it received. Can such a payment be recovered from the underwriters? We think not. The payment is not a proximate effect of the perils of the sea, but has grown out of circumstances which may or not be connected with them. That payment, therefore, cannot be charged upon the underwriters: it can no more be charged upon them, than can a penalty inflicted for a breach of the revenue laws, rendered inevitable by the circumstances in which a ship is placed. On neither of the grounds on which this application is rested can it be suffered to succeed. There will, therefore, be no rule for a new trial in this case.

Rule refused.

BODENHAM and others *v.* RICKETTS.

Same *v.* Same.

Same *v.* Same.

RULES for writs of prohibition to the Consistory Court of *Hereford*, the Arches Court, and the Court of Delegates. The plaintiffs, as churchwardens of *Presteign*, in the diocese of *Hereford*, in *July*, 1830, commenced a suit against the defendant in the Consistory Court of *Hereford*, for the recovery of several church-rates. The libel was afterwards amended, and they prosecuted their suit for a rate of 4*l.* 6*s.* 3*d.* for

1. Under 53 *Geo.* 3, c. 127, s. 7, the jurisdiction of the Ecclesiastical Court is not taken away in all cases where the amount of church-rate claimed does not exceed 10*l.*, but only in those cases where the validity of the rate, and the liability to pay, are not disputed.

2. A prohibition does not lie after sentence in a suit in the Ecclesiastical Court, for a church-rate for less than 10*l.*

3. A prohibition does not lie to an inferior Court after sentence, unless the want of jurisdiction be apparent on the face of the proceedings.

the year 1829. In that suit, sentence was pronounced against the defendant, and he appealed to the Arches Court of *Canterbury*, and failed. He then appealed to the Court of Delegates, but sentence was affirmed against him with costs (*a*). The defence set up in the Ecclesiastical Court was, that the rate had been made at a meeting, of which no due or legal notice had been given; that it was made for an illegal purpose; and that it showed on the face of it an unequal assessment. No summons had been issued, or proceedings taken previous to the suit in the Ecclesiastical Court, before any justice, under statute 53 *Geo.* 3, c. 127, s. 7.

The *Attorney-General*, in *Michaelmas* term, showed cause. He cited *In re Poe* (*b*), *Gould* v. *Gapper* (*c*), *Buggin* v. *Bennett* (*d*), *Blacquiere* v. *Hawkins* (*e*).

Sir *F. Pollock*, in support of the rule, cited Bac. Abr. Courts (D), Com. Dig. Prohibition, (F 8,) and *Rex* v. *Wrottesley* (*f*).

Cur. adv. vult (*g*).

Lord DENMAN, C. J., in this term, (1st *February*,) gave judgment.—There were three cases of *Bodenham* and others v. *Ricketts*, in which three separate applications for writs of prohibition were made in the same cause. The first to the Consistory Court of *Hereford:* the second to the Court of Arches: and the third to the Court of Delegates, in each of which Courts successively, sentence had passed against the applicant. The original suit was instituted in the Consistory Court of the diocese of *Hereford*, to enforce the payment of a church rate amounting to 4*l.* 6*s.* 3*d.*; and the defence was, that the rate had been made at a meeting, of which no proper notice had been given: that the rate was made for an illegal purpose: and that it showed on the face of it an unequal assessment. It was contended, in favour of the application, that the Court below had no jurisdiction to proceed in the matter of a church-rate, where—as in the present case,—the sum to be recovered was under 10*l.* It was answered, in showing cause, that the objection was too late after sentence, unless it appeared on the face of the proceedings in the Court below. There cannot be any doubt that the rule is clearly established, that a party who neglects to object to the want of jurisdiction in the first instance, after sentence, and having taken his chance of a decision in his favour, cannot allege the want of jurisdiction as a ground for prohibition, unless the defect be apparent on the face of the proceedings. The justice and convenience of this rule are very apparent. It is the duty of this Court to restrain any incroachment of jurisdiction in inferior courts: but then it interferes for the benefit of the public, and not of the individual. Consequently, it only interferes when the want of jurisdiction is apparent on the proceedings; for in that case alone would the public be injured, by an in-

(*a*) Writs *de contumace capiendo* were issued to enforce payment of the rate, and the costs of the several suits. The validity of those suits, and the significavits on which they were founded, became questions pending both in this Court and in Chancery. See *Rex* v. *Ricketts*, *ante*, p. 64.

(*b*) 5 Barn. & Adol. 681.
(*c*) 5 East, 345.
(*d*) 4 Burr. 2035.
(*e*) 1 Doug. 378.
(*f*) 1 Barn. & Adol. 648.
(*g*) The arguments sufficiently appear in the judgment of the Court.

correct judgment being allowed to stand and become a precedent. In support of the application, the general doctrine was scarcely disputed; but it was contended, that as it appeared upon the face of the libel, that the amount claimed for the rate was under 10*l.*, the want of jurisdiction was apparent. It was necessary to consider the statute *53 Geo.* 3, c. 127, s. 7, to see whether that argument was borne out. That section says, "that if any one duly rated to a church rate or chapel rate, the validity whereof has not been questioned in any Ecclesiastical Court, shall refuse or neglect to pay the same sum at which he is so rated," there shall be a summary mode of enforcing payment before two justices, who may, by their order, direct the payment of what is due and payable in respect to such rate, "so as the sum ordered and directed to be paid as aforesaid do not exceed ten pounds over and above the reasonable costs, &c." An appeal is then given to the sessions, with a proviso, that if any such appeal be made, no warrant of distress shall be granted until after the appeal is determined. This is followed by a proviso, "that nothing therein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.*, from the party proceeded against." If the section had stopped here, we should have thought it clear, that a distinction was made between cases where the validity of the rate was questioned, and those in which it was undisputed. We should have said, that, as to the former, the jurisdiction of the Ecclesiastical Court was left wholly untouched; but that, as to the latter, it was impliedly taken away in cases where the sum did not exceed 10*l.* This interpretation makes the enacting part of the statute, and the proviso together, constitute one complete enactment on the subject; and this view is rendered more clear by the subsequent proviso, "that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demands, according to due course of law, as theretofore used and accustomed." This latter proviso clearly applies only to cases under 10*l.*, and the effect of it is, that the moment it appears that a question is opened as to the validity of the rate, the summary jurisdiction is at an end, and the jurisdiction of the Ecclesiastical Court attaches. It is evident, therefore, that the mere fact, that the suit appears on the face of the proceedings to relate to a rate not exceeding 10*l.*, does not necessarily show a want of jurisdiction in the Ecclesiastical Court. Without entering into the argument at the bar, as to the doctrine in question being applicable to Ecclesiastical Courts, it is quite certain that this Court ought to examine the whole of the proceedings, in order to collect from them, if possible, whether the cause, admitting it was for less than 10*l.*, was a suit in which the validity of the rate or the liability of the party was questioned, or whether it was a proceeding merely to enforce payment,—that being the real point upon which the whole question of jurisdiction depends. On such an examination, in this case it is clear that the sum being under 10*l.*, the only objection to paying the rate arose from its validity being questioned. It follows, therefore, that there is no want of jurisdiction apparent on the face of the proceedings; the rules

King's Bench.

BODENHAM and others v. RICKETTS.

must therefore be discharged in all the three cases; but, under the circumstances, without costs.

Rules discharged, without costs (*a*).

(*a*) In *Easter* term (18th *April*,) Sir *F. Pollock* renewed his application for a prohibition on the same affidavits, with an additional affidavit, verifying the proceedings before the Consistory Court. The *Attorney General* objected that the applications had been already disposed of. He cited *Rosset* v. *Hartley*, (*ante*, p. 581,) to show that such being the case, the Court would not entertain the subject:

The Court, acting on that principle, refused to grant any rule.

NICHOLSON *v.* JOHN REVELL the Younger.

1. Two joint and several notes were given to come due at different dates. After one of them had become due, the holder received from one of the makers a sum exceeding the amount of the note which was due, and exceeding his share of the aggregate amount of the two notes. This sum was received in discharge of that maker from whom it was received; and the holder accordingly gave up to him the note that was due, and erased his name from the other note:—*Held*, that such maker was discharged from all claim on the remaining note; and that thereby the other maker was also discharged.

2. *Quære*, whether the holder of a note, merely erasing the name of one of two joint and several makers, is a discharge of the other.

3. A discharge by a debtee of one joint and several debtor, is a discharge of all.

ASSUMPSIT. First count, on a promissory note for 110*l.* 13*s.* 4*d.* Second count, on a note for 56*l.* 13*s.* 8*d.*: both counts were by the payee against the maker. *Plea*: to the first count, that the note was a note made on the 1st *January*, 1832, by the defendant, one *Samuel Revell*, and one *John Revell*, the father of the defendant; whereby they jointly and severally promised, twenty-five months after date, to pay to the plaintiff, or order, 110*l.* 13*s.* 4*d.* for value received; and that afterwards the plaintiff, without the knowledge, privity, or consent of the defendant, struck out the name of *Samuel Revell* and erased the same from the note, and then discharged *Samuel Revell* from all liability on the note, and from payment of the sum mentioned therein, or any part thereof. A similar plea to the second count. *Replications* to both pleas, that before and at the several times thereinaftermentioned, *John Revell* the father was indebted to the plaintiff in 299*l.* for money due upon an account stated, and of which the defendant had notice, and thereupon it was agreed between the plaintiff and *John Revell* the father, *Samuel Revell*, and the defendant, that the plaintiff should accept, and *John Revell* the father, *Samuel Revell*, and the defendant, should give their promissory note for 299*l.*, as and for a satisfaction and security of and for the debt so due from *John Revell* the father to the plaintiff, and that they did so: that afterwards, and after the time for payment of the promissory note, and an action which the plaintiff had brought in the *King's Bench* against *John Revell* the father, *Samuel Revell*, and the defendant, upon the promissory note being then depending; it was further agreed between the plaintiff, and *John Revell* the father, *Samuel Revell*, and the defendant, that the action should cease, and that the plaintiff should accept, and that *John Revell* the father, *Samuel Revell*, and the defendant, should give their three joint and several promissory notes, viz.—a note for 52*l.* 18*s.* 8*d.*, bearing date the 1st *January*, 1832, payable thirteen months after the date thereof; the said note for 110*l.* 13*s.* 4*d.*; and a note for 56*l.* 13*s.* 8*d.*, as and for a satisfaction and security of and for 200*l.*, parcel of the debt so due from *John Revell* the father, to the plaintiff, with interest thereon; and that afterwards *John Revell* the father, *Samuel Revell*, and the defendant, in pursuance of the agreement, made the said three promissory notes accordingly; and afterwards, and after the time of payment of the first of the three notes, and before the time of payment of the others, *Samuel Revell* proposed to the plaintiff to pay him 100*l.* in discharge of his liability on the three promissory notes, which the plaintiff agreed to accept, and thereupon *Samuel Revell* paid

to the plaintiff the said 100*l.* in discharge of his liability on the three promissory notes, and the plaintiff then accepted the same accordingly, and thereupon the plaintiff gave up to *Samuel Revell* the note for 52*l.* 18*s.* 8*d.*, and indorsed on the note for 110*l.* 13*s.* 4*d.* as follows:—"Received on account by *Samuel Revell*, 47*l.* 1*s.* 4*d.* This sum, with the amount of the first note, makes 100*l.*;"—and after the payment to him by *Samuel Revell* of the said 100*l.* the plaintiff struck out the name of *Samuel Revell* on the note, and erased the same therefrom, and discharged *Samuel Revell* from any further liability on the last-mentioned note, and from any further payment on account thereof: *Rejoinders*, that the three promissory notes were given for securing the payment of sums together exceeding 200*l.*, to wit, 220*l.* 5*s.* 8*d.*, and were so given by *John Revell* the father, and by *Samuel Revell*, and the defendant, as his sureties; and have been held by the plaintiff for securing part of the debt of *John Revell* the father, and interest thereon, as in the replication mentioned, and for no other consideration or purpose whatsoever; and that the said proposal of *Samuel Revell*, was so made by *Samuel Revell*, and accepted and acted on by the plaintiff; and the name of *Samuel Revell* was so as aforesaid struck out and erased from the said promissory notes, and *Samuel Revell* discharged from liability thereon, without the knowledge, privity, or consent of the defendant: *Surrejoinders*, that at the time of giving the three promissory notes, the money satisfied and secured to the plaintiff by the said promissory note for 52*l.* 18*s.* 8*d.* remained long over-due, and the debt so due from *John Revell* the father, to the plaintiff, remained wholly unpaid and unsatisfied; and the action in the replications mentioned was pending, and the agreement mentioned in the replications was entered into; and that the existence of the said several circumstances, so in the said replications mentioned, were the consideration and purpose of the three several promissory notes mentioned in the replications to have been given: without this, that the said three promissory notes were given by *Samuel Revell* and the defendant, as sureties for *John Revell* the father, and for no other consideration and purpose. *Demurrer*, showing for cause, that the plaintiff, in and by his surrejoinders, offered to put in issue a matter not properly issuable; also, that the plaintiff did not deny, or confess and avoid the substantial matter alleged in the rejoinders; also, that in the surrejoinders the plaintiff traversed a negative, and a matter not alleged in the rejoinder. *Joinder in demurrer.*

Wightman, in support of the demurrer.—The alteration was made without the consent of the party now sued; it changed the nature of the instrument on which his liability rested, and he is thereby discharged. In *Perring* v. *Hone* (*a*), where a note, which was a joint note only, was altered into a joint and several note, the alteration was held to discharge the party, and a subsequent letter of his was not admitted as a waiver of the discharge. The party here would lose the right of suing for contribution.

White, contrà.—This is not a material alteration. In *Perring* v. *Hone* it was so: the alteration there was from a joint to a joint and several note, which made a material difference. In this case the note was joint or several

(*a*) 4 Bing. 28.

at the option of the holder, and he merely exercised that option. In *Slingsby's* case (*a*), it is said, that "sundry persons may bind themselves, *et quemlibet eorum*, and so the obligation shall be joint or several, at the election of the obligee." That rule must apply here. In *Ex parte Gifford* (*b*) it was held, that the discharge of a mere surety was no discharge of a co-surety. So in *Collins* v. *Prosser* (*c*), the tearing off the seal of one of the obligors of a joint and several bond, was held not to avoid it as against the others. In *Austen* v. *Howard* (*d*), it was held, that it was no plea to debt on a replevin bond, that it purported to be executed by more than one, yet was in fact executed only by the defendant. Yet it is quite clear, that the nature of the defendant's liability was there altered, and that he was deprived of the benefit of suing for contribution.

Wightman, in reply.—The holder of the bill has no right to sue one of these parties after having discharged the other.—[Lord *Denman*, C. J.—Suppose he had released one?]—That would have been a release of both.—[Lord *Denman*, C. J.—It would if they had been merely joint-contractors. Would it be so if the contract was joint and several?]—It would, for the remaining party would lose his right to sue for contribution. The nature of the contract itself would be altered. The question simply is, whether a discharge to one of two joint and several debtors is a discharge of the other. In *Cheetham* v. *Ward* (*e*), it was held, that if the obligee in a joint and several bond, make one of the obligors his executor with others, the right of action on the bond is gone as to both. In that case, *Eyre*, C. J., refers to an old case in the Year Books (*f*), in which it was held, that if three be bound in an obligation, jointly and severally, and the obligee make one of the obligors his executor, he who is made executor shall have no action against the others, for if one is discharged all shall be discharged. The present case is precisely the same in principle.

Lord DENMAN, C. J.—We have reason to believe that this case is brought within the old case in the Year Books. We shall require time to go through the pleadings, and see whether, in point of fact, the pleas amount to a discharge.

Cur. adv. vult.

Lord DENMAN, C. J., afterwards (30th *January*) delivered judgment.—This was an action by the payee against the maker of two promissory notes. The defendant pleaded to each count separately, setting out the same facts as a defence to both. He alleged, that the notes were jointly and severally made by himself and two other persons, *Samuel Revell*, and *John Revell* his father; and that the plaintiff, without his knowledge or consent, struck out and erased the name of *Samuel Revell*, one of the joint and several makers of the notes, and thereby discharged him from the payment of them. We do not feel called upon to inquire, what the effect of a demurrer to these pleas would have been, because additional facts are brought to our knowledge by the subsequent pleadings. The replications state, that *John Revell* the father, one of

(*a*) 5 Rep. 19 b.
(*b*) 6 Ves. Jun. 805.
(*c*) 1 Barn. & Cress. 682.
(*d*) 1 Moore, 68, and 7 Taunt. 28.
(*e*) 1 Bos. & Pull. 630.
(*f*) 21 Edw. 4, 81, b.

the makers of these promissory notes, had been indebted to the plaintiff, and that it was agreed, that the defendant, *John Revell* the father, and *Samuel Revell*, should give their joint and several note to the plaintiff for the said debt, and that they gave such note as and for a satisfaction and security for the said debt, which plaintiff accepted accordingly; and that default being made in the payment of that note, it was agreed between the plaintiff and the defendant, the said *John Revell* the father, and *Samuel Revell*, that an action theretofore commenced by the plaintiff against the three, should be no further prosecuted, and that the plaintiff should accept three promissory notes, given by the defendant and the two others, as a security and satisfaction for 200*l.*, parcel of the said debt and interest; the first of these notes being a note for 52*l.* 18*s.* 8*d.*; and that after the first note became payable, and was unpaid, and before the day of payment of the note declared upon in the first count, *Samuel Revell* and the plaintiff agreed that *Samuel Revell* should pay to the plaintiff 100*l.* in discharge of his liability on the said three notes, and the plaintiff thereupon gave up to *Samuel Revell* the first of the three notes, and indorsed on the second a receipt for the difference between the amount of it and 100*l.*, and struck out the name of *Samuel Revell* from that note, being the note in the first count mentioned, and it is averred that the plaintiff discharged *Samuel Revell* from any further liability on the said note. The rejoinders identify the note declared on, and the others mentioned in the replication, as the three notes given by the defendant and the others in fulfilment of the agreement therein mentioned; and state, that they were given for securing 220*l.* 5*s.* 8*d.* due to the plaintiff from *John Revell* the father, and that the name of *Samuel Revell* was struck out of the note, and that *Samuel Revell* was discharged from liability thereon, without the knowledge or consent of the defendant. The plaintiff surrejoins, that, at the time of giving the three promissory notes in the replications mentioned, the whole money secured by the original note was unpaid, and the action brought against the three still pending, and that these circumstances were the sole consideration for the three notes; and then traverses, that the notes were given by *Samuel Revell* and the defendant, as sureties for *John Revell* the father. To the surrejoinders the defendant demurs, and has contended, that the traverses are immaterial, and that the facts appearing on the record entitle him to our judgment: and we are of that opinion. But we do not proceed on some of the grounds urged at the bar, such as the effect of the plaintiff's alteration of the instrument, as making it void; or that the defendant thereby lost his right to contribution from the joint makers of the note, or on any doctrine as to the relation of principal and surety. We give our judgment merely on the principle laid down by *Eyre*, C. J., in *Cheetham* v. *Ward*, as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all; for we think it clear, that the new agreement made by the plaintiff with *Samuel Revell*, to receive from him 100*l.* in full of one of the three notes, and in part payment of the other two before they became due, accompanied by the erasure of his name from those two notes, and followed by actual receipt of the 100*l.*, was, in law, a discharge of *Samuel Revell*. This view cannot, perhaps, be made entirely consistent with all that is said by Lord *Eldon*, in *Ex parte Gifford*, where his lordship dismissed the petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have

King's Bench.

NICHOLSON v. REVELL.

adverted was not presented to his mind in its simple form, and the point certainly did not undergo much consideration: for some of the expressions employed would seem to lay it down, that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keeps his remedy entire against the others, even without consulting them. If Lord *Eldon* used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrines connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favour of the defendant.

Judgment for the defendant.

CLARKE and another *v.* SPENCE and another.

1. A bankrupt, before his bankruptcy, contracted to build a ship for the plaintiffs, according to the terms of an agreement, by which the price was to be paid by instalments at specific periods, as the building proceeded, and the work was to be done under the superintendance of a person appointed by the plaintiffs. The work proceeded, and two of the instalments became due and were paid, and a sum was paid by anticipation on account of the third instalment to the bankrupt before his bankruptcy. The assignees proceeded with the ship after the bankruptcy, and the plaintiffs tendered to them the remaining instalments, according to the agreement: —*Held*, that the plaintiffs might maintain trover against the assignees for the ship, when completed.

TROVER for a ship. The plaintiffs were merchants at *Newcastle*, and the defendants, the assignees of *John Brunton*, a bankrupt, who had formerly carried on the business of a ship-builder there. At the trial before *Alderson*, B. at the Spring Assizes at *Durham*, in 1834, a verdict was found for the plaintiffs for 1002*l.* 11*s.*, subject to the opinion of the Court on a special case, in which, amongst other things, it was stated, that on a previous occasion *Brunton* had built a ship called the *Andromeda* for the plaintiffs, and on the 24th *February*, 1832, an agreement was entered into between the plaintiffs and *Brunton* for the latter to build another vessel, which was to be launched in *November*, and to be paid for in the same manner as the former. The agreement contained the following stipulations.

"It is agreed between Mr. *John Brunton*, of *Southwick*, ship-builder, and *Clark, Blummer* & Co. of *Newcastle*, that the said Mr. *John Brunton* will build a vessel of the before-mentioned dimensions, in every point fully equal to the *Andromeda* in workmanship, with the materials of the sizes and descriptions before-named, all of approved quality; Mr. *Benjamin Steward* to superintend the building and outfit, the vessel to be launched in the month of *July* next ensuing, for the sum of 3250*l.*, payable as follows:—

When rammed, by bill at three months' date to the amount of .	£400
When timbered, the like payment of	400
When decked, the like payment of	400
When launched, the like payment of	500
The residue or balance, one half at four months and six months date, to the amount of	1550
	£3250

2. As soon as any of the materials had been approved of by the superintendant, and used in the progress of the work, the fabric, consisting of such materials, was appropriated to the purchaser; and as soon as the last of the necessary materials was approved and added to the ship, the fabric was complete, and the general property vested in the purchaser. The payment of the instalments specifically appropriated the very ship in progress.

3. The ship was not, under the circumstances, in the order and disposition of the bankrupt, within the 6 *Geo.* 4, c. 16, s. 72.

Messrs. *Clarke* & Co. to be allowed the amount of sail-bill from the six months bill. Signed at *Southwick*, 24th *February*, 1832.

John Brunton.
Thomas Clarke, for self & Co."

There were the following memorandums on the agreement:—

"1832, *March* 22d, agreed with Mr. *Brunton* to make the vessel six inches deeper, say, to be 17½ feet deep, for which he is to be paid 25*l.*

"On the same day, arranged with Mr. *Steward* to inspect the building of the vessel, for which he is to be paid the sum of 40*l.*

"*Thomas Clarke.*"

Brunton proceeded in his yard at *Southwick* to build the vessel, and before his bankruptcy the vessel was rammed and timbered. Two instalments of the agreed price, viz. 400*l.* when the vessel was rammed, and 402*l.* 11*s.* when the vessel was timbered, were duly paid, according to the agreement, by the plaintiffs to *Brunton*, before his bankruptcy, and the further sum of 200*l.* was paid by way of anticipation, on account of the third instalment to *Brunton* by the plaintiffs, previous to his bankruptcy, and which payments so made as aforesaid previous to the bankruptcy, amounted to the sum of 1002*l.* 11*s.* The frame of the vessel, at the time of the bankruptcy of *Brunton*, on 25th *October*, 1832, was worth 1601*l.* 13*s.* 7*d.*, that being the value of the timber and the work done upon her. After the bankruptcy of the defendants, the assignees took possession of all the effects of the bankrupt, including the frame of the ship, which was on *Brunton*'s premises. In *November* a demand was made by the plaintiffs, claiming the frame as their property, and giving notice that it was not the property of the bankrupt. No tender of any sum of money was at that time made by the plaintiffs to the defendants. A week or two after *Christmas*, 1832, the defendants proceeded to complete the vessel, and in *February*, 1833, they were served with a notice, that the plaintiffs, being informed that they were not proceeding according to the terms agreed upon, required that *Steward* should be allowed to inspect. On the 1st *March*, 1833, when the third instalment would have become payable according to the terms of the contract, supposing no alteration to have been produced by the intervening bankruptcy, 200*l.*, as for the balance of the said third instalment then unpaid, was tendered by the plaintiffs to the defendants, and by them refused. On the 23d *March*, 1833, the ship was launched. A bill at three months for 500*l.*, as for such instalment, according to the terms of the agreement, was tendered in payment of such instalment by the plaintiffs to the defendants, and was refused by the defendants. On the 14th *June*, 1833, the defendants put up the vessel for sale by public auction, and it was at that auction bought in by the defendants, and the vessel was afterwards sold by the defendants, by private contract, for 2600*l.* After the auction, and before the sale by private contract was completed, the plaintiffs tendered to the defendants the sum of 1750*l.* (which, with 1002*l.* 11*s.* paid as aforesaid, make together 2752*l.* 11*s.*) in payment for the vessel, and demanded the vessel from them, which the defendants refused. It was admitted on the trial, that the vessel was never of greater value than the sum of 2750*l.* Evidence of reputed ownership was rejected at the trial, and a

verdict was taken, subject to the opinion of the Court on the following points. 1st. That, under the circumstances, the property in each portion of the ship passed to the plaintiffs successively as each portion of it was completed. 2d. That no tender was requisite subsequent to the bankruptcy, and if requisite, that a sufficient tender had been made. 3rd. That under the circumstances, trover might be maintained. 4th. That the evidence of reputed ownership was properly rejected.

W. H. Watson, for the plaintiffs.—Every part of the timber, when put into the vessel, was specifically appropriated to the plaintiffs, and the party employed to build it had no right to substitute another vessel for it. This was stated in judgment by Lord *Tenterden*, in *Woods* v. *Russell* (*a*). The case of *Mucklow* v. *Mangles* (*b*) will be relied on by the other side. The circumstances of that case are different from the present; or, if not, then it has been expressly overruled in *Woods* v. *Russell*. The vessel there was not to be paid for as specific portions were finished, for if that had been so, the property must have passed to the purchaser. The contract here is for payment by instalments as each specific portion is finished, and the purchaser obtains a vested right in each portion when he pays the stipulated purchase-money, subject only to the builder's right of lien. The doctrine in *Woods* v. *Russell* is founded on true principles. In *Blackstone's Commentaries* (*c*) it is said, "as soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor, but the vendee cannot take the goods until he tenders the price agreed on. But if he tender the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them." That principle was fully recognized in *Atkinson* v. *Bell* (*d*), in which *Woods* v. *Russell* was distinguished from the case then under the consideration of the Court. In *Carruthers* v. *Payne* (*e*), the person by whose order a chariot was built, and who had paid for it, was held entitled to maintain trover for it, though it had remained in the possession of the maker long after it was finished. The cause of *Rohde* v. *Thwaites* (*f*), and *Simmons* v. *Swift* (*g*), show the principle on which specific appropriation of a part proceeds. That principle came into operation in this case,—the property became vested in the plaintiffs, and they have the right to maintain trover. The assignees stand in the same situation as the bankrupt, and the tender utterly divests any portion of the lien from them. Then, as to the property having remained in the order and disposition of the bankrupt. The circumstances here do not bring the case within the 72d section of the 6 *Geo.* 4, c. 16. The vessel was not to be delivered by the bankrupt till it was finished. Two things are necessary to bring the case within the Bankrupt Act; first, the consent of the owner; and, secondly, the possession of the bankrupt as the reputed owner. Neither of these things existed here. The bankrupt was entitled to the possession till the vessel was finished, but it was a special possession, subject to the control of the inspector appointed by the plain-

(*a*) 5 Barn. & Ald. 942.
(*b*) 1 Taunt. 318.
(*c*) Vol. II. p. 448.
(*d*) 8 Barn. & Cress. 277.
(*e*) 5 Bing. 270.
(*f*) 6 Barn. & Cress. 388.
(*g*) 5 Barn. & Cress. 857.

tiffs to superintend the work. That gets rid of the question of consent. In *Smith* v. *Topping* (*a*), where the true owner permitted his goods to remain in the order and disposition of *A.* until the day before he became bankrupt, and then demanded possession of them, which *A.* refused to deliver, the Court held, that they did not pass to *A.*'s assignees. *Carruthers* v. *Payne* (*b*) is to the same effect. *Muller* v. *Moss* (*c*) most resembles the present case. There the bankrupt remained by agreement in possession of a house and furniture, which had been sold to another person, and the agreement was notorious to all the neighbourhood. While so in possession he became bankrupt, and the Court held, that this was not a possession by the bankrupt within the 21 *Jac.* 1, c. 19, s. 11. The principle of that case was fully acted on in the *Earl of Shaftesbury* v. *Russell* (*d*), where the party was in possession of certain household furniture under the limitations of a devise. Here, as in those cases, the bankrupt was in possession under special circumstances, and consequently had not such a possession as would pass the ship to his assignees. The owner here could not consent to the possession of the bankrupt, so as to bring himself within the statute, and evidence of consent was therefore perfectly useless.

Coltman, contrà.—The property in the several parts of the vessel did not pass in the manner contended for. The evidence tendered was improperly rejected. *Woods* v. *Russell* is not in point. It was decided on grounds totally different from the present; but in *Mucklow* v. *Mangles* the general principle of law was distinctly laid down; but that case will not wholly govern the present, as there was not a particular description of property there on which the principle could operate, as in this case. There was a case in this Court arising out of the same circumstances as the present, the case of *Battersby* v. *Gale*, which has not been reported, but which may furnish an illustration in point. That case was tried at *Lancaster*, before Mr. Baron *Gurney*, in the spring of 1833. It arose out of the same bankruptcy as the present, and the parties there had governed their conduct by the third portion of the holding in *Woods* v. *Russell*. A new trial was moved for in *Easter* Term.—[*Patteson*, J.—I have a note of *Battersby* v. *Gale*—it is a short note. *Woods* v. *Russell* was cited in that case. The plaintiffs were merchants at *Liverpool*, the defendants were the assignees of *Brunton*, a bankrupt. The agreement between the plaintiffs and the bankrupt was for a ship to be built, launched, and ready for sea, with provisions &c., at a certain time, and to be paid for by four instalments of 500*l.* each. The second instalment was to be paid when the vessel was fully timbered. The second instalment never strictly became due, for it was not fully timbered at the time of the bankruptcy. At the trial before Mr. Baron *Gurney* the plaintiff was nonsuited. Mr. *Wightman* moved to set aside the nonsuit, and stated, that the learned baron had left it to the jury to say whether the vessel was of greater value than 1000*l.*, and the jury said that it was, namely, of the value of 1120*l.*; but that it was not left to the jury, as it ought to have been, whe-

(*a*) 5 Barn. & Adol. 674.
(*b*) 5 Bing. 270.
(*c*) 1 Maule & Selw. 335.
(*d*) 1 Barn. & Cress. 666.

ther the ship was of greater value than 1000*l.* according to the contract price. I think that was the point on which we said we should speak to Mr. Baron *Gurney*. Whether the Court fully considered the authority of *Woods* v. *Russell* I am not able to say.] There must be a delivery of the article, otherwise the person to whose order it is made has no property in it; *Goode* v. *Langley* (*a*).—[*Patteson*, J.—There were no payments of instalments during the contract in that case. Mr. *Watson*'s argument here may be considered to amount to this, that this is the same as if there were so many ships or so many parcels of goods, and that when the instalment on each became due and was paid, the property in each vested in the plaintiffs; and if so, that trover is maintainable. My difficulty is, whether the plaintiffs can possibly be more than tenants in common with the bankrupt.]—It cannot be contended that there has been a specific appropriation of each part. The contract between the parties is not for a part of a ship, but for a whole ship. The contract is one entire contract throughout. The arrangements as to part-payment of the money are reasonable, because the building of a ship requires a large outlay of money, and the party gets the article cheaper by making these advances as the work proceeds. That is the object of making them, and not specifically to appropriate each portion of the ship. It is not generally for the advantage of the purchaser to have the parts of a manufactured article thus appropriated to him while in the hands of the manufacturer, for they would then be at his risk; nor was it so intended here. The appointment of the inspector makes no difference in the case. It was of advantage to both parties that he should be appointed. In *Woods* v. *Russell*, Lord *Tenterden* seems to think, that the payment of the instalments appropriated specifically the very ship so in progress. That cannot be so. Suppose a man agrees with one person to build a ship, and does so, but afterwards disposes of it to another person, the first party may bring an action for damages for breach of contract, but it does not follow that he can obtain the very ship itself. The property would not pass even by an express agreement to appropriate the particular parts as they were finished. The passage cited from *Blackstone*'s *Commentaries* is not applicable to the present case.—[*Patteson*, J.—He is speaking of goods as if furnished, not of work to be done upon them.]—The right of the builder here is not a mere right of lien upon the property of another, for the property has never passed out of himself. As long as any thing remains to be done to the goods, the property in them does not pass to the purchaser; *Rugg* v. *Minett* (*b*), and *Simmons* v. *Swift* (*c*). A similar principle was adopted in *Rohde* v. *Thwaites* (*d*). —[*Coleridge*, J.—Suppose, after the instalment had been paid, a fire had happened, and the ship had been burnt, could there have been an action to recover back the instalments? You assumed just now that the risk was with the builder.]—The risk is with the man who has the property; *Carruthers* v. *Payne* (*e*). The ship here was clearly in the order and disposition of the bankrupt, and as such liable to be taken by his assignees. The bankrupt appeared to the world as the reputed owner of it; *Lingard* v. *Messiter* (*f*).—[*Patteson*, J.—When a tradesman bankrupt does a specific thing to an article of manufacture, can he be said to be in the reputed owner-

(*a*) 7 Barn. & Cress. 26.
(*b*) 11 East, 210.
(*c*) 5 Barn. & Cress. 857.
(*d*) 6 Barn. & Cress. 388.
(*e*) 5 Bing. 207.
(*f*) 1 Barn. & Cress. 308.

ship of it?]—He may, if he appears to all the world to be working up his own stock, and thereby acquires a credit.

W. H. Watson, in reply.—The words of Lord *Tenterden* are exactly applicable to this case. He says (*a*), "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress." —[*Coleridge*, J.—The decision, however, there was on the ground that the property passed at a subsequent period.—*Patteson*, J.—Lord *Tenterden* merely meant that the party, by the payment of the money, was entitled to the particular thing for which he had agreed and paid.]—The property here passed, and if the ship had been burnt after the payment of the second instalment, the plaintiff could not have recovered back the money paid. As to this being a tenancy in common between the plaintiffs and the bankrupt, the argument is not that each part vested on each payment, but that on the first payment being made the property vested in the purchaser, not only as to what was done, but what was to be done.—[*Patteson*, J.—My observation only applied to the supposition that you maintained the former argument.]—*Rugg* v. *Minet* and *Simmons* v. *Swift* are cases of specific appropriation by the act of the parties, and therefore do not apply to the present. There is nothing here to prevent the property vesting in the plaintiffs.

PATTESON, J.—The facts in *Woods* v. *Russell* are somewhat different from those in this case, and there are expressions there which require consideration.

On the last day of *Hilary* Term, 1836, the judgment of the Court was delivered by

WILLIAMS, J.—This case was argued in *Michaelmas* Term last, by Mr. *Watson* for the plaintiffs, and Mr. *Coltman* for the defendants, before my brothers *Patteson* and *Coleridge*, and myself. The principal question that was raised was, in whom, under the special terms of the contract entered into between the plaintiffs and the bankrupt, *John Brunton*, the general property, in so much of the vessel as had been put together at the time of the bankruptcy, was vested? All consideration of any special property that might be in the bankrupt, by reason of the lien for monies expended on the vessel, according to the doctrine laid down in *Woods* v. *Russell*, was removed out of the case by the tender of the amount of all such monies which had been made by the plaintiffs; and we desire it to be understood, that in the judgment we are about to pronounce, we give no opinion whatever as to the soundness of that doctrine; it was not denied in argument, nor could it be, according to decided cases and known principles of law, that in general, under a contract for the building of a vessel, or making any other thing, not existing *in specie* at the time of the contract, no property vests in the party, —whom for distinction we will call the purchaser,—during the progress of the work, nor until the vessel or thing is finished or delivered, or at least ready for delivery and approval by the purchaser; and that in cases where the contract contains a stipulation for the completion of particular portions of

(*a*) *Woods* v. *Russell*, 5 Barn. & Ald. 946.

King's Bench.

CLARKE and another v. SPENCE and another.

the vessel or other thing, and fixes the time and precise mode of payment, as each portion is completed, the general property in all the timber and other materials used in the progress of the work, vests in the purchaser at the time then they are put to the fabric under the approval of the superintendant, or, at all events, as soon as the first instalment is paid. Mr. Justice *Bayley*, in the case of *Atkinson* v. *Bell*, says, "Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed; and although, while the goods are in progress, the maker may intend them for the person ordering them, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered." So that it appears that the builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but he may dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers the specification contained in that contract. But it was urged, on the authority of the case of *Woods* v. *Russell*, that when the contract provides (as that in question does) that where a vessel should be built under the superintendance of a person appointed by the purchaser, and also fixes the payment to be made by instalments, regulated by particular stages in the progress of the work, the general property in the planks and other things vests in the purchaser when these things are put in the power of the superintendant, or as soon as the first instalment is paid. The facts in the case of *Woods* v. *Russell* did not make it necessary to determine this point; neither did the decision of the Court proceed ultimately upon any such point, but on the ground that the vessel, by virtue of the certificate of the builder, had been registered in the name of the purchaser, and that the builder had, by his own act, declared the general property to be in that purchaser. That appears both by the judgment itself, and by the notice taken of it by Lord *Tenterden*, in the last edition of his book upon *Shipping*, p. 44; but there is one passage in the course of that judgment which seems to us to establish the point contended for by the counsel for the plaintiffs; and although the opinion expressed in that passage be extra-judicial, yet, considering that time was taken before the judgment was pronounced, and the great learning of those by whom it was pronounced, we should hesitate long before we came to any conclusion contrary to that opinion. The passage is as follows:—"This ship is built upon a special contract; and it is part of the terms of that contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid,—part when they are at the light plank. The payment of those instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship; and that, as between him and the builder, he is entitled to insist on the completion of that very ship, and that the builder is not entitled to require him to accept any other." It seems to be perfectly clear, that as by the contract the vessel was to be built under the superintendant appointed by the purchaser, the builder could not compel the purchaser to accept any vessel not constructed of materials approved by that superintendant; and, on the other hand, that the purchaser could not refuse

any vessel which had been so approved. It follows, that as soon as any materials have been approved by the superintendant, and used in the progress of the work, the fabric consisting of such materials is appropriated to the purchaser, otherwise the superintendant might be called upon when the one vessel had been already completed, or nearly so, to begin the work *de novo*, and superintend the building of a second; and, upon this point, the appointment of a superintendant by the contractor appears to be of considerable importance. As soon as the last of the necessary materials is approved and added to the vessel, and the fabric of the vessel is complete, the appropriation is complete; and assuredly, the general property in the vessel must vest in the purchaser, nothing remaining to be done prior to the delivery; and this is agreeable to the current of all the authorities, most of which have been alluded to above. Until, however, the last of the materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel, not for a part of a vessel; and we have not been able to find any authority for saying that, whilst the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed, shall vest in the purchaser, except the above passage in the case of *Woods* v. *Russell*, is to be considered sufficient for that purpose. It is quite clear, and indeed will sufficiently appear from some of the foregoing observations, that there are reasons, and those not unimportant, which lead to the conclusion, that, notwithstanding some of the stipulations, the property in the ship under this contract did not vest in the purchaser (as for the purpose of brevity we have designated him), until completion and delivery or acceptance by him; yet we equally feel that the view taken of the contract by the Court, in the case of *Woods* v. *Russell*, may be supported, because the intention there supposed is not in any respect inconsistent with that which is above suggested. Both might well exist at the same time, for if it was the intention of the contracting parties that the general property should vest in the manner supposed, such intention might have been expressed in less ambiguous terms; but if it can be fairly collected from those that have been used, there is nothing which in principle or practice is to prevent the Court from carrying it into effect; on the contrary, we think, that as such a construction has been put upon a similar contract by so high an authority in *Woods* v. *Russell*, which has, as to this point in particular, been subsequently recognized; and as that kind of contract has been probably acted upon since that decision by persons engaged in ship-building, we feel we ought not to depart from such construction, or to unsettle the law upon this subject; and we adopt the opinion of the Court in *Woods* v. *Russell*, though with some hesitation, for the reasons above assigned. Another point was raised on the statute of the 6 *Geo.* 4, c. 16, s. 72, with respect to reputed ownership in cases of bankruptcy; as to which, it is sufficient to say, that this case is plainly not within the statute, because, although the plaintiffs were the true owners of the vessel, yet, as it was not in the possession, order, or disposition of the bankrupt, within the meaning of that section, any more than a vessel, or any other article sent to a builder or manufacturer to be repaired, is within that section, we think that evidence, as to reputed ownership, was properly rejected. Upon the whole we are of opinion, that the plaintiffs are entitled to maintain

King's Bench.

CLARKE and another v. SPENCE and another.

this action of trover, and that the verdict must be entered for them for the sum stated in the case, viz. 1002*l.* 11*s.*

Judgment for the plaintiffs.

PEARCE *v.* CHESLYN (*a*).

The defendant, by a lease which was not stamped, demised to *J. W.* He afterwards, by an agreement stamped with a lease stamp, but which did not contain words of demise, though it referred to the lease, let the same premises to the plaintiff:—*Held*, that the terms of the lease were incorporated in, and formed part of the agreement; and that the former was admissible in evidence, though it was not stamped:—*Held*, also, that both together amounted to a lease at a specific rent, for which the defendant had a right to distrain.

REPLEVIN. Avowry, as for a distress for rent in arrear for a year and one quarter, ending *June* 24th, 1834. *Plea: non tenuit.* At the trial before *Vaughan*, B., at the Summer Assizes, 1835, for *Leicestershire*, it appeared, that by a memorandum of agreement made on the 29th *January*, 1833, the defendant agreed to set and to farm let to *John Webberley*, and *John Webberley* agreed to take and become tenant of the premises in question; to hold from the 25th day of *March* then next ensuing, for one year, and after the expiration thereof, until six months should have elapsed from the day of the decease of *J. Webberley*, or until six months after notice to quit, yielding and paying 229*l.* 5*s.*, payable by equal quarterly instalments. This agreement contained a variety of farming covenants. It was executed by *Webberley* and the defendant, but was not stamped. After the execution of this agreement, upon some dispute arising between these parties, that lease was given up, and the plaintiff took the premises under the following memorandum of agreement, which was annexed to the one between the defendant and *Webberley*:—"Memorandum of agreement. Whereas the within-named *John Webberley* and *Richard Cheslyn* having agreed to abandon the annexed contract, &c.; we, *W. Pearce*, of &c., and the said *Richard Cheslyn*, do agree, the former to take and become tenant, and the latter to let and to farm set the therein farm, &c., the said rent to be annually paid by quarterly payments, and to be in amount 220*l.*; and we further bind ourselves to the other, to execute a similar agreement to the one recited and referred to." This memorandum had a proper lease stamp upon it. The first agreement was received in evidence to show the terms upon which the plaintiff held the premises. A verdict was found for the defendant.

G. T. White moved for a new trial, on the ground of the improper reception of the first agreement in evidence, there being no stamp upon it; and secondly, that the second agreement only amounted to an agreement for a lease, and therefore did not authorize a distress, and support the avowry. He distinguished *Poole* v. *Bentley* (*b*) and *Staniforth* v. *Fox* (*c*), because, in these cases, the judges relied upon the possibility of collecting from the instrument itself all the requisites of a demise, which could not be done here. Reference must be made to another instrument which could not be received in evidence for want of a stamp.

Lord DENMAN, C. J.—Suppose one party agrees to grant a lease, and another to take, according to the terms of a memorandum contained in the book called "The Attorney's Pocket-Book," which contains numerous pre-

(*a*) This case was determined in *Michaelmas* term, 1835, but was accidentally omitted in its proper place.

(*b*) 12 East, 168.

(*c*) 7 Bing. 590.

cedents of leases, do not those terms compose part of the agreement between the parties?

COLERIDGE, J.—Taking the first and the second agreement together, you have all the stipulations of a perfect lease.

PATTESON, J.—All these questions, whether a lease, or an agreement for a lease, must depend upon the terms contained in the instrument itself under consideration.

Cur. adv. vult.

Lord DENMAN, C. J., afterwards (17th *November*) gave judgment.—The questions in this case were, whether a particular instrument was properly received in evidence by the learned judge at the trial; and whether an instrument which was stamped with a lease stamp and given in evidence, was such as to enable the defendant to levy a distress for rent accruing under it. It was argued, that as the second instrument referred to a lease which was not stamped, the lease which it referred to could not be read in evidence. We are of opinion, however, that that argument is not well founded, as the first instrument was incorporated with, and became part of the second instrument, which was stamped with a lease stamp. On the second point, the original lease being incorporated with the subsequent agreement, there is no doubt that, as that first instrument contained words of present demise, there was a sufficient lease to entitle the defendant to distrain.

Rule refused.

TICKLE *v.* BROWN.

TRESPASS. First count, for assaulting and imprisoning *W. Coombe*, the servant of the plaintiff, *per quod servitium amisit*. Second count, for ill-treating and detaining the plaintiff's horse. Third count, *de bonis* (harness, corn, &c.) *asportatis*. *Pleas:* first, not guilty to the whole declaration; secondly, to the first count, that the defendant was possessed of a close, and that he committed the assault in defence of his possession; thirdly, to the second count, the same justification. *Replications* to each justification, that the plaintiff had a right of way through the close, which had been enjoyed as of right for forty years. *Rejoinder* to the replication to the second plea, that the plaintiff and divers others, occupiers for the time being, whilst they were so, and during the said period of forty years, to wit, on &c., and divers others &c., were respectively interrupted in the use and enjoyment as of right of the said way; and that the said parties, so respectively interrupted, submitted to and acquiesced in those interruptions for the space of one year and more after the same parties respectively had had notice thereof, and of the persons respectively making the same; and whilst the parties so interrupted were respectively the occupiers of the said lands, and whilst the parties so interrupting them were respectively the occupiers of the lands over which they respectively interrupted them in the use of the said way.

1. Issue joined on a general traverse under 2 & 3 *Will.* 4, c. 71, of a right of way enjoyed as of right for forty years:—*Held*, that evidence of a parol agreement for permission to use the way on payment of a sum of money, made within the forty years, was admissible on this issue.

2. A deed or agreement in writing, showing the origin of a right claimed, need only be specially pleaded under 2 & 3 *Will.* 4, c. 71, s. 5, when the deed or agreement was made before the commencement of the period of years for which the right is claimed.

Surrejoinder, traversing the interruption in the enjoyment of the right of way, and issue thereon. *Rejoinder* to the *replication* to the third plea, traversing the enjoyment of the way as of right for forty years, with a special inducement that *W. Coombe* and the plaintiff were endeavouring, against the will of the defendant, to go over the close in a particular direction. *Surrejoinder*, re-asserting the enjoyment of the right of way for forty years; concluding to the country, and issue thereon. At the trial before Lord *Denman*, C. J., at the Summer Assizes for *Devon*, in 1834, a witness of the name of *Joanna Baskerville*, who was a daughter of a predecessor of the plaintiff, was called to prove the user of the way by her father, the then occupier of the plaintiff's estate. She was asked, on cross-examination, whether, under a parol agreement made in 1798, a payment of a penny a year had not been made by the occupier of the plaintiff's estate, to the occupier of the defendant's estate, for passing in the way claimed in the pleading to have been used as of right. It was objected for the plaintiff, first, that as that payment had reference to an agreement, it ought to have been specially pleaded, according to the provisions of section 5 of 2 & 3 *Will.* 4, c. 71; and, secondly, that if there had been such an agreement it would have been unavailable under the second section of that statute, not being by deed in writing. For the defendant it was contended, that the question was admissible on the last issue to negative the enjoyment for forty years; and also on the other issue, as showing that there was an interruption of that enjoyment acquiesced in by the plaintiff, or as showing the nature of the interruption of the right of way claimed. The learned judge, thinking that the objections were well founded, rejected the evidence as not admissible on either of the issues. There was also some other evidence of interruption of the right of way, but it did not clearly appear under what circumstances this interruption took place. The jury gave a verdict for the plaintiff; and a rule had since been obtained to set aside the verdict and have a new trial, on the ground that the evidence thus offered had been improperly rejected.

Sir *W. Follett* and *Crowder* showed cause.—The pleadings, on the part of the plaintiff, in substance amount to this, that the plaintiff and the occupiers of the farm in question had used this way as of right. The question is, whether it is necessary to rejoin specially an agreement under the statute (*a*).

(*a*) 2 & 3 *Will.* 4, c. 71, s. 2 & 5. By section 2 it is enacted, "that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, to be enjoyed or derived upon, over, or from any land, &c. of any lay person, when such way, or other matter as herein last before-mentioned, shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed," by showing only that such way was first enjoyed at any time prior to such twenty years; "and where such way, &c. shall have been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." Section 5, "In all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned; or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

—[*Patteson*, J.—You could not, under either of these issues, give evidence of the origin of the enjoyment by agreement; but the interruption of it, even for once, would be a strong fact to show the real circumstances under which the enjoyment had been created.]—The evidence of interruption, or of the acquiescence in the interruption, was not objected to at the trial; but the question is, whether, on the proof that one party has enjoyed this way as of right for forty years, the other party has not cast upon him, if he denies the right of way, the duty of showing that the enjoyment of that right had its origin in a specific agreement. It is clear that this duty was cast on him, and the enjoyment being proved, he cannot cut it down, but by the production of an agreement in writing, nor without specially rejoining that agreement. That objection arises on the words of the statute. Another objection is, one depending on the principles of the New Rules of pleading, namely, that a man must not be taken down to trial, on the understanding that the state of the pleadings calls on him to prove one thing, and then be subject to find at the trial that another is set up. The evidence here tendered was for the purpose of showing that the usage was not an usage as of right, and such evidence cannot be given under the provisions of the 5th section of this statute, but by the production of an agreement in writing. To enable the defendant to give this evidence the matter should have been specially put on the record. The case of the *Monmouth Canal Company* v. *Harford* (*a*) is supposed to have decided the point now in question, but that case is distinguishable. The plea there was, that "the plaintiffs had not been accustomed to use." The evidence there given was of application by the defendant for leave to make the cross tram-roads. Those applications were so many acknowledgments on the part of the defendant, that he had no right to make them without leave of the plaintiffs, and they were admissible to negative the right. The effect of the agreement in this case is to show, that the plaintiff never had a right except under the agreement. It negatives the right of the plaintiff to use the way, except under an agreement, which is of no use unless it be in writing; and if in writing, cannot be set up in answer unless it be pleaded. *Bright* v. *Walker* (*b*) is also distinguishable on the same ground. Suppose the claim to have been of a right of way by user as of right for twenty years, it could not have been shown upon the issue on the user, as of right, that the party had used the way by virtue of an agreement. That would go to show, that he never had a prescriptive right, and must have been pleaded.—[*Patteson*, J.—The words, as of right, in the statute, mean adversely.]—And the allegation in the replication should have been specially put in issue, for otherwise the plaintiff's evidence might be defeated by evidence of other facts not put in issue on the record.

The *Attorney-General*, and *W. C. Rowe*, in support of the rule.—Both the special replications are put in issue by the rejoinders. The evidence tendered was admissible on the issue now framed, or not at all. The fifth section of the statute does not apply to this case, because the agreement not being in writing, but being a mere verbal licence, it could not have been rejoined. There may be some difficulty in reconciling the second and fifth sections, but they are reconcileable, if after the words "simple fact of enjoy-

(*a*) 1 C. M. & R, 614; *S. C.* 5 Tyr. 68. (*b*) 1 C. M. & R. 211; *S. C.* 4 Tyr. 502.

ment" be inserted " as aforesaid," or " as of right," that is, referring the enjoyment to that which is spoken of in the second section, namely, an enjoyment by a person claiming right. Suppose a party, each time he comes upon the way, was to say that he did not claim it as of right, but that he did it with the licence, or in despite of the party occupying, would not that be evidence to show the nature of his enjoyment, that it was not of right?—[*Patteson*, J.—If this had been a claim of right of way for twenty years, the parol licence must have been pleaded. But you say that being forty years, and not being pleadable, because not in writing, it can be given in evidence upon the general traverse.]—In *The Monmouthshire Canal Company* v. *Harford*, applications for leave to lay the trams were admitted in evidence upon the general traverse.—[*Patteson*, J.—In that case there was no evidence of the existence of any agreement;—there leave only was asked and granted. I have no doubt that was evidence upon the general traverse; here is more;—not only is leave asked and granted, but there is a clear agreement. The plaintiff would use the way as of right under that agreement, and the fifth section enacts, that it shall be sufficient to allege the enjoyment as of right, and if the other party shall intend to rely on any agreement, the same shall specially be alleged and set forth, and shall not be received in evidence in any general traverse or denial.]—The construction to be put upon the statute is this: that where a party claims as of right, and makes out that right by an enjoyment of twenty or forty years, he may make out his case by proving the user alone for that period; and any thing which occurred before the commencement of the forty or twenty years must be pleaded; but any thing which occurred within the twenty years, or within the forty years, which has a tendency to show that it was by permission, and not as of right, that the enjoyment took place, may be given in evidence on the general traverse. It is difficult to see a distinction between a licence given for twelve months, which this agreement amounted to, and a licence given for a day. Each leave given for a time was a new agreement *pro hâc vice*, and ought to have been specially replied. On the first issue, the plaintiff was bound to prove not only a simple enjoyment, but an enjoyment as of right, and any thing which shows that enjoyment not to have been of right, may be given in evidence on the general traverse. The case of *Bright* v. *Walker* is confirmatory of this view of the case. This was also evidence upon the second issue, as showing an interruption and acquiescence; or, at all events, as showing that the ceasing to use the way was because the party had no right.—[*Patteson*, J.—The words " as of right" must of necessity mean, as of right from a right, or from an agreement.]—The evidence as to the acts of former tenants was admissible against the plaintiff, for the evidence of the conduct of former occupiers was received as against the defendant. The defendant is the reversioner, and by the statute the acts of his tenants are made to bind him. The acts of the tenant of the plaintiff must in like manner bind him. Again, the payment of money was clearly evidence, and the declarations accompanying that act were also evidence. The doctrine is thus laid down in *Phillips* on Evidence (*a*): " Where it is necessary in the course of a cause to inquire into the nature of a particular act, or into the ntention of the person who did the act, proof of what the person said at the

(*a*) Vol. I. p. 220, 6th edit.

time of doing it, is admissible in evidence, for the purpose of showing its true character."

Cur. adv. vult.

Lord DENMAN, C. J. afterwards in this term, (1st *February,*) (*a*) gave judgment.—This was an action of assault. There were two pleas of justification in defence of a close, and two special replications, claiming a right of way over the close in question for forty years. At the trial which took place before me, it was proposed to show on the part of the defendant, that there had been a parol agreement between these parties relative to the use of the way claimed, and that a consideration had been paid by the plaintiff's predecessors, for the liberty of passing along this way, in the year 1798. This evidence was offered on the third issue to negative the enjoyment for forty years as of right; and it was also offered on the second issue, as of itself showing an interruption acquiesced in, or at all events, as explanatory of the character of a cessation to use the way for four years, commencing in 1800, which cessation was proved and ascribed by the defendant to interruption, but by the plaintiff to a voluntary abstaining from the user, on account of the close being in tillage. The evidence was rejected, and the plaintiff had a verdict, and the defendant obtained a rule *nisi* for a new trial, on the ground of that rejection. The question turns upon the second and fifth sections of *2 & 3 Will.* 4, c. 71, which the Court is called upon to construe with reference both to the law and form of pleading. In so doing, we have the assistance of the cases of *Bright* v. *Walker*, and *The Monmouthshire Canal Company* v. *Harford*, in which this act of parliament came under the consideration of the Court of *Exchequer*. The greatest difficulty arises from the language of the concluding paragraph of the fifth section, and more particularly from the words "or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment." As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and as by the rules of pleading, and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the legislature used the words "as of right" in such a sense, as that a party confessing the enjoyment as of right, for forty or twenty years, as the case may be, may account for and avoid the effect of it, by alleging in the one case a consent or agreement, provided it be by deed or writing, and in any other any contract, &c. written or verbal. It follows that the words "as of right" cannot be confined to an adverse right from all time, as far as evidence shows, for if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was had by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words "enjoyment as of right" cannot be confined to enjoyment under a strict legal right, for there a consent or agreement in writing not under seal (of which the second section speaks,) could not account for such enjoyment. The words therefore must have a wider sense, and yet they must have the

(*a*) The case was argued in *Michaelmas* Term, 18th and 19th *November*, 1835.

King's Bench.

TICKLE v. BROWN.

same sense as the words "claiming right thereto" in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the "enjoyment as of right" must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, and notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal—by prescription and adverse user, or by deed conferring the right—or, though not strictly legal, yet lawful to the extent of exercising a trespass—as by a consent or agreement in writing not under seal, in case of a plea of enjoyment for forty years, or by such writing, or by parol consent or agreement, contract or licence, in case of a plea of enjoyment for twenty years. According to this view of the act, a licence in writing must be replied to a plea of forty years enjoyment, if it cover the whole time; and the same of a verbal licence in case of a plea of enjoyment for twenty years; but it was argued, that each leave given in case of permission repeatedly asked, is *pro hâc vice* as much a consent or agreement as a consent or agreement for twenty years, and therefore, according to this view of the act, ought to be replied; which is contrary to the decision of *The Monmouthshire Canal Company* v. *Harford.* On looking at the report of that case, we find that the decision rests on this ground, viz. that the asking leave from time to time within the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that at that time the asker had no right; and therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow, that not only an asking leave, but an agreement commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the fifth section, for the party cannot and does not rely on it, as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement, but as showing that there was not, at the time when the agreement was made, an enjoyment as of right, and that so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. The evidence proposed ought therefore to have been received on the second issue; and on the third it may also have been admissible to show that the cessation to use was by reason of want of right, and not from voluntary abstinence. The rule for a new trial, therefore, must be made absolute.

Rule absolute.

FARLEY and others, Executors of APREECE, Bart. *v.* BRIANT and others.

DEBT for rent on a demise. The plaintiffs were executors of Sir *Thos. Hussey Apreece*, Bart., and the defendants were heirs and devisees of *John Briant*, deceased. There were several special pleas, and, on demurrer to them, judgment was given for the defendants (*a*). A rule had since been obtained, under the 3 & 4 *Will.* 4, c. 42, s. 31, to exempt the plaintiffs from costs (*b*). The affidavits on which it was obtained stated, that the chief expense had been incurred by the plaintiffs in ignorance of the existence of a certain letter which was in the possession of the defendants, and the disclosure of which would have prevented the necessity for some of the pleadings: that the defendants had severed in their defences, and thus made the pleadings unnecessarily long: that the plaintiffs had been compelled to bring the action in order to get equity to administer the estate; and that they had done so under legal advice, and had avoided every possible unnecessary expense in the conduct of it.

1. The burden of making out an exemption from costs, under 3 & 4 *W.* 4, c. 42, s. 31, on the part of an executor plaintiff who has failed in his action, lies on him; because the exemption is an exception from the general rule under which executors who are plaintiffs and have failed, are liable for costs.

2. It is not sufficient for such a plaintiff to show that the action was brought *bonâ fide* under legal advice to try a doubtful point of law, which it was necessary to have decided in order to obtain an equitable administration of assets in a creditor's suit.

3. The conduct of the defendant after action brought, relative to the mode of conducting the defence, will not be considered by the Court in exercising their discretion.

Maule showed cause.—There is no ground for the Court to interfere in the present case. The statute did not mean to exempt the plaintiff from paying costs when he was not misled by the conduct of the defendant into bringing an action. The present application has been founded upon a mere exception in the statute. The plaintiffs must therefore clearly show themselves to fall within this exception, for otherwise their general liability continues. They have not done so here. In *Southgate* v. *Crowley* (*c*), the Court decided upon this very statute, that the circumstance that an executor has commenced and conducted an action properly, is not sufficient to exempt him from costs if he fails. That case therefore distinctly decides the present, for the only reason for this application is, that the executors have conducted themselves properly. The rule of the old law, therefore, as stated in *Dowbiggin* v. *Harrison* (*d*), must apply; and there an executor was held liable to costs, he having been nonsuited on a count upon a promise to him as executor. In this instance, therefore, these plaintiffs are liable to costs under the old law, and they have not established any case of exemption under the recent statute.

Stephen, Serjt., in support of the rule.—This was an action brought under legal advice to try a doubtful point of law. It was necessary to have this point decided, in order that equity might administer the estate. The plaintiffs therefore have merely fulfilled a duty in trying it, and would have been liable to a *devastavit* if they had not tried it. Under such circumstances, this Court will not make the executors liable to costs *de bonis propriis*. The object of the statute was, not to make executors in all cases liable to costs, but merely to prevent vexatious actions. This action was not vexatious, and

(*a*) See *ante*, p. 300.

(*b*) By that secion it is enacted, "that in every action brought by any executor or administrator in right of the testator, such executor or administrator shall, unless the Court in which such action is brought shall otherwise order, be liable to pay costs to the defendant," &c.

(*c*) 1 Bing. N. S. 518.

(*d*) 9 Barn. & Cress. 666.

King's Bench.

FARLEY and others *v.* BRIANT and others.

the Court may exercise its discretion in favour of the executors. The cases cited do not apply, for this is the only case in which the plaintiffs have failed upon a mere point of law. When each party is blameless, each should pay his own costs. In *Engler* v. *Twisden* (*a*), the defendant obtained a verdict in an action of debt on bond, by showing his discharge under the Insolvent Act. *Tindal*, C. J. said, "that if the plaintiff had exercised a *bonâ fide* discretion in bringing the action, the costs would not fall upon him;" and then referred to circumstances to show that he had not exercised such a discretion. That case may therefore be considered as establishing the principle, that where the plaintiff has exercised a *bonâ fide* discretion, the Court will interfere to protect him from costs. Now it is quite clear that the plaintiffs have done so here. *Parke*, J. gave the same reasons as his lordship for not interfering, and referred to *Lysons* v. *Barrow* (*b*), and *Gaselee*, J. concurring with the Court, said, that there had been a new trial in that case, and that the plaintiff had obtained a verdict. All the judges therefore referred to the facts of the case to guide them in their decision. The facts of the case here make a strong ground for the interference of the Court. *Southgate* v. *Crowley* is a startling case, and was decided by three judges against the decided difference of the fourth. That decision is very unsatisfactory, and if followed up will be very mischievous in its effects.

Cur. adv. vult.

Lord DENMAN, C. J. in this term (*c*) (30th *January*,) delivered the judgment of the Court.—This was an action brought by the plaintiffs as executors, against the defendants as devisees and heir of a testator, under the 3 & 4 *Wm. & M.* c. 14, and was argued upon demurrer to the plea, when judgment was given for the defendants. This was a motion under the 3 & 4 *Will.* 4, c. 42, s. 31, and was made on the part of the plaintiffs as executors, to be relieved from the payment of costs. As this was the first case of the kind which had come on to be decided in this Court under the statute, it stood over for the purpose of being considered, with the view of determining what should be the rule in cases like the present. The language of the statute clearly shows, that an executor, when plaintiff, shall, generally speaking, be placed with respect to the payment of costs on the same footing precisely as a person suing in his own right. This is the general rule, and may be considered to be founded upon the natural justice of indemnifying a successful defendant against the costs of an action which has been wrongfully brought against him. The cases hitherto decided upon the old statutes were attributable, not so much to any desire on the part of the Courts to afford any extraordinary protection to executors, as to the construction of the language of the statute of 23 *Hen.* 8, c. 15, which did not embrace cases where parties were suing in their representative character. Upon the general rule afforded by these cases, the recent statute has engrafted an exemption, which empowers the Court or a judge to give relief to executors. (Here his lordship read the words of the statute.) This being an exception to a rule, we are clearly of opinion, that a party applying for relief under it, is bound fully to make out the ground on which he claims to be considered within the

(*a*) 2 Bing. N. S. 263.
(*b*) 10 Bing. 563.
(*c*) This case was argued in *Michaelmas* Term, (23d *November*.)

meaning of the exception. Is that done in the present case? The affidavits here show that the claim was considered one of a doubtful nature; that the assets were large, but that the estate being under administration in Chancery, it was necessary to establish the claim as a debt at law, before it could be carried into the Master's office; and that before the action was commenced, an eminent counsel was applied to for an opinion, and he advised that the claim was likely to be successful, or at least that there was so much of probability that it would be so, that it was the duty of the plaintiffs, as executors, to take the opinion of a Court of Law upon it. It was then said, that there was an unnecessary prolixity in the pleadings caused by the defendants, by which the costs had been needlessly increased; and that the facts set out would, if communicated to the plaintiffs before the action, have been admitted, and perhaps the action might not have been brought. But we dismiss both these points from our consideration; the first, because we think the plaintiffs' liability to costs cannot be affected by such conduct of the defendants after the suit has commenced; and the second, because there had not been any previous inquiry by the plaintiffs of the defendants as to the real circumstances under which the claim stood, and because we think that the plaintiffs ought rather to make an inquiry of the defendants as to such a matter, than that the defendants should be expected to volunteer a statement of the nature of the defence. The plaintiffs' case on this claim of exemption must therefore rest upon the original grounds, namely, that this was an action *bonâ fide* brought to determine a doubtful claim, and brought under legal advice, the case being represented to the executors as one which it was their duty to try. We may add to these statements, which from our own knowledge of this case appear to be true, that it was always an action most doubtful as to its result, and that in the end it did fail upon a point of law. We are therefore of opinion, that enough has not been made out to call on us to deprive the defendants of their costs. The defendants have been guilty of no deception, and have been put to the expense of defending themselves against an action which was not maintainable. As a general rule, therefore, they would be entitled to their costs, and we do not see enough in the circumstances here to exempt the plaintiffs from the liability to pay them. No authorities have been quoted, nor can be, we believe, to show that the plaintiffs would have been liable to a *devastavit* for declining to try this doubtful point of law; and if they were misled by advice,—which however good and *bonâ fide*, might have misled them,—it is just that they, and not the defendants, should bear the expense. The cases of *Wilkinson* v. *Edwards* (*a*), and *Southgate* v. *Crowley*, in the same volume, and *Engler* v. *Twisden*, in the second volume, are all intended to give effect to the words and intention of the provisions of the statute. We entirely concur in those decisions, and therefore this rule must be discharged.

Rule discharged.

(*a*) 1 Bing. N. S. 301.

END OF HILARY TERM.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME,

CONTAINING

THE DECISIONS OF THE COURT OF KING'S BENCH,

FROM

HILARY TERM, 1835, TO HILARY TERM, 1836, INCLUSIVE.

ACTION.

IF a trustee admits that a balance belonging to his *cestui que trust* is in his hands, an action at law for money had and received may be maintained by the *cestui que trust* on such admission. *Roper* v. *Holland*, 167.

Where the trustee of an estate, who had funds belonging to his *cestui que trust* in his hands, said that he was ready to pay to him 10*l.* down if he would give credit for certain repairs:—*Held*, that it was such a statement of account and declaration of a balance due as would maintain an action. *Id.*

ADVERSE POSSESSION—See EJECTMENT.

AFFIDAVIT.

It is no objection to an affidavit that the words "before me," in the jurat, are struck out, and "By the Court" inserted. *Austin* v. *Grange*, 670.

The description of a party in an affidavit as an "assessor" is sufficient. *Nathan* v. *Cohen*, 107.

An affidavit signed by the deponent in some foreign character, which was illegible, may be read in Court. *Id.*

"Of Kennington, in the county of Surrey," is not an insufficient description in an affidavit of the residence of the deponent. *Wilton* v. *Chambers*, 116.

Where a wife sued as administratrix, together with the husband, and the title of an order to tax the attorney's bill took no notice of the husband, a rule *nisi* for an attachment for non-payment of a sum found due by the Master's *allocatur* was granted on an affidavit intituled as in the action, and not like the order. *Schooling* v. *Crouchman*, 369.

A joint affidavit made by an attorney and his clerk, which stated the residence of the attorney, but not of the clerk, *held* sufficient. *Bottomley* v. *Bellchamber*, 362.

An affidavit, the heading of which omitted to name the persons who were defendants, as "defendants," is bad. *Harris* v. *Griffiths*, 515.

An affidavit describing the deponent as "the defendant in the cause," and as "now in the custody of the sheriff of *Middlesex*," sufficiently complies with the rules of M. T. 15 Car. 2, and H. T. 2 W. 4, I. s. 5. *Jervis* v. *Jones*, 654.

An affidavit in which the initial only of one of the defendant's christian name was stated in the title, *held* bad. *Master* v. *Carter*, 672.

An affidavit of debt "for money had and received by the defendant for and on account of the plaintiff, and at his request," instead of "to and for the use of the plaintiff," is not sufficient. *Kelly* v. *Curzon*, 678.

An affidavit of debt made by the assignee of a bankrupt for a sum of money "for interest agreed to be paid by the defendant, as appears to this deponent by the books of account of the bankrupt, and as this deponent verily believes to be true," is sufficient. *Harrison, Assignee*, v. *Turner*, 346.

An affidavit of debt for money paid, laid out, and expended, "to and for the use and on the account of the defendant," *held* sufficient. *Id.*

An affidavit to hold to bail, stating that a certain sum is due for principal and interest on a promissory note for a certain amount, bearing interest, is sufficient without distinguishing how much is due for principal and how much for interest. *Drake* v. *Harding*, 364.

In an affidavit to hold to bail it was stated, that a certain sum was due for money lent and

advanced, &c. "and for money due and payable for interest upon and for the forbearance of divers sums of money due and payable, and by plaintiff forborne at the request of the defendant:"—*Held*, that the special contract to pay interest was not sufficiently stated. *Drake* v. *Harding*, 364.

An affidavit of debt which is bad in part is bad entirely. *Id.*

An affidavit of debt which is bad in part is bad altogether. *Id.*

An affidavit of debt for a sum due on a bill of exchange must expressly state for what sum the bill was drawn. *Rackett* v. *Gye*, 198.

An affidavit of debt, in which the deponent described himself as "late of *Tyrone* in the county of *Tyrone* in *Ireland*, but now in *Dublin Castle*," was held sufficient. *Stuart* v. *Gavernan*, 699.

An affidavit of debt, stating it to be for goods delivered by plaintiff and his late partner, is insufficient. *Edgar* v. *Watt*, 108.

An affidavit of debt, part of which was for interest, not stating expressly the contract on which the interest was payable, *held* good. *White* v. *Sowerby*, 213.

AGENT.

Quære, whether a factor who sells goods on credit without disclosing his principal, has authority to receive payment from the vendee before the period of credit has elapsed, so as to make such a payment without knowledge of the principal binding on him. *Heish* v. *Carrington*, 306.

Semble, that there is a custom to that effect in the London corn market. *Id.*

AGREEMENT.

See LANDLORD AND TENANT. PLEADING. STAMP. WARRANTY.

An agreement in writing entered into for the assignment of a public-house in the occupation of the party himself, together with several cottages in the occupation of tenants, does not necessarily import that actual possession of the cottages is to be given by turning the tenants out. *Palmer* v. *Temple*, 702.

Semble, that if a party in such a case insists on actual possession being given, he should state such intention early enough to enable the other party to comply with it. *Id.*

AMENDMENT.—See PRACTICE. SHERIFF.

Where there has been a mistake of the clerk in entering up the judgment on a *scire facias* to obtain execution on a judgment in debt, by entering it in the form in assumpsit; *quære*, whether the Court can amend it in a subsequent term. *Kloss* v. *Dodd*, 342.

ANNUITY.

In ejectment an annuity deed was relied on; it was not inrolled, but it contained a declaration or covenant by the grantor, that the premises on which the annuity was secured "were of more than sufficient annual value to answer and pay the annuity over and above all charges:"—*Held*, that it was open to the grantor notwithstanding to give evidence that the premises were not of sufficient value to answer and pay the annuity, in order to avoid the deed. *Doe* d. *Chandler and Wood* v. *Ford*, 378.

Semble, that it is incumbent upon the grantee, who relies upon an annuity deed which has not been inrolled, to show that it is within the exemption of the statute. *Id.*

APOTHECARY.

It is not necessary to plead specially as a defence to an action on an apothecary's bill, that he has not a certificate to practise from the Society of Apothecaries, as that is part of the plaintiff's case. *Morgan* v. *Ruddock*, 505.

APPRENTICE.—See PLEADING. SETTLEMENT.

Where an apprentice is bound to two partners, on the death of one he becomes, in law, the apprentice of the survivor. *Rex* v. *St. Martin, Exeter*, 69.

A child of parents settled in and chargeable to a parish, might have been bound by the parish officers under 43 *Eliz.* c. 2, with the assent of two justices, though the child was resident in another parish at the time of the execution of the indenture. *Rex* v. *St. George, Exeter*, 372.

Under that statute a parish apprentice might be bound to a master who was not a parishioner. *Id.*

The consent of the apprentice is not requisite in the case of a parish apprentice. *Id.*

An indenture of apprenticeship executed in 1799, where no money consideration was given as a premium, requires the stamp of 10*s.* imposed by 27 Geo. 3, c. 111, and is not within section 3, by which deeds of apprenticeship, where a sum not exceeding 10*l.* is given as a premium, are exempted from the additional duty imposed by that statute. *Rex* v. *Mabe*, 460.

An indenture of apprenticeship bore date in June, 1813, but was not in fact executed till two years afterwards:—*Held*, that this indenture was not, on that account, made void by the provisions of the 9 Anne, c. 9, ss. 35 and 39, and 5 Geo. 3, c. 46, s. 19, so as to prevent the apprentice from gaining a settlement, there being in neither statute any express provision that the omission to insert the true date should avoid the indenture. *Rex* v. *Harrington*, 747.

APPORTIONMENT.—See LANDLORD AND TENANT.

ARBITRATION.

The Court will not set aside an award on the ground that the arbitrator has rejected certain evidence, that rejection not appearing on the face of the award. *Armstrong* v. *Marshall*, 643.

Where all matters in difference in the cause between the parties in an action against two defendants were referred to arbitration, and the arbitrator refused to hear evidence or adjudicate upon the subject of four checks drawn by one of the defendants alone, on the ground that it was not a matter in difference between the parties to the reference:—*Held*, that the award was not final and conclusive, and that it must be set aside. *Samuel* v. *Cooper*, 86.

Whilst an action was pending a submission to arbitration had been made, instead of being referred by order of a judge; after the award was published the submission was made a rule of Court, as agreed between the parties. The time limited by 9 & 10 W. 3, c. 15, for setting aside the award had expired. *Rushworth* v. *Barron*, 122.

A rule to set aside an award made after action commenced, on account of objections to the declaration, need not refer to the declaration, as it is sufficiently before the Court. *Sherry* v. *Okes*, 119.

Where a rule to set aside an award was drawn up, on reading the affidavit and the paper writing annexed, which was in fact a copy of the award, but it was not stated to be so:—*Held*, that the rule was bad, and could not be amended. *Id.*

A rule *nisi* to set aside an award under an order of *nisi prius* having been discharged on a mere technical objection:—*Held* not too late to move for a second rule after the first four days of the term next after the award was made. *Id.*

Rule *nisi* to set aside an award on the ground of partiality refused, though it appeared that the umpire made the award with the assistance chiefly of one of the arbitrators, who omitted to take down part of the evidence in favour of one party, the other arbitrator interfering very little. *Waltonshaw* v. *Marshall*, 209.

The Court will not set aside an award on the ground that the arbitrator has made a mistake, where all the facts were placed before him, and he was competent from his occupation to judge of them, unless the Court can see clearly it was a mistake. *Hardy* v. *Ringrose*, 185.

Where a cause was agreed to be referred, but the agreement was not made a rule of Court; the Court refused to compel the payment of a sum awarded against the party who proposed the reference. *Clarke* v. *Baker*, 215.

Where a cause was referred at *nisi prius* to an arbitrator, and after the award a rule was obtained to refer it back to the arbitrator to reduce the damages, or enter a verdict for the defendant, on which the Court gave judgment that the verdict ought to be reduced:—*Held*, that the costs of this rule were properly taxed as costs in the cause. *Goodall* v. *Ray*, 333.

An action of trespass, to which the defendant had pleaded both a private and a public right of way, was referred at *Nisi Prius* to an arbitrator, together with all matters in difference in the cause between the parties. It was agreed, also, that the plea of a public right of way was to be withdrawn, but that the arbitrator was to decide as to the costs as if it remained. The arbitrator was also to award as to the future use of the road. The arbitrator found the private right of way for the defendant, and set out the way he should in future use, and he gave him the costs of the cause, including the costs on the issue of the public right of way:—*Held*, 1. That a motion to set aside the award might be made at any time during the term next after the publication of the award.—2. That a rule to set it aside, on the ground that the arbitrator had misapprehended the terms of the reference, or had exceeded his power, should state specifically the instances in which he had done so. —3. That the arbitrator had not, in fact, found a public and private right of way over the same spot.—4. That the award could not be set aside on the ground that there was evidence to support a public but not a private right of way.—5. That the arbitrator did not exceed his authority in giving the defendant the costs of the issue on the public right of way, having given him the verdict on the issue of the private right of way. *Allenby* v. *Proudlock*, 357.

On the trial of a cause respecting the right to use a watercourse, a nominal verdict for 1000*l.* was entered, subject to an award, and power was granted to the arbitrator to decide as to the future use of the water. The arbitrator by accident allowed the time for making the award to elapse without enlarging it. The Court then allowed the plaintiff to enter up judgment and issue execution, unless the defendant would consent to the time for making the award being enlarged. *Wilkinson* v. *Time*, 351.

An award declared that a yard and pump were the sole and exclusive property of the plaintiff, except that the defendant had a right to take water from the pump, and to have ingress and egress to and from the yard in which it stood for that purpose; and further, that the pump should thereafter be considered as belonging to the plaintiff and defendant jointly, and be repaired at their joint expense:—*Held*, that there was no objection to the award, on the ground that the direction as to the future enjoyment was inconsistent with the former part of the award; and that there was no excess of authority. *Boodle* v. *Davies*, 420.

Where by an agreement of reference after ac-

tion brought, but before declaration, "all the costs are to abide the event of the award," the arbitrator has no power over the costs. *Boodle* v. *Davies*, 420.

The rule *nisi* to set aside an award must state in specific terms the grounds of objection. It is not enough to state generally that the arbitrator has exceeded his authority, or that the award is uncertain, or not final. *Id.*

By the terms of a submission a Chancery suit and all matters in difference between the parties were referred; and it was made an express matter of reference whether an agreement between the parties should be rescinded or not. The arbitrator merely decided as to the Chancery suit, that each party should pay his own costs; and gave no directions upon the subject of rescinding the agreement, but awarded specifically on every subject-matter of the agreement:—*Held*, that the award was not sufficient; but *quære*, whether the award was not sufficiently final as regarded the adjudication upon the Chancery suit. *Upperton* v. *Tribe*, 280.

Matters in difference were referred to two arbitrators, one appointed by each party, and an umpire chosen before proceeding with the reference. The award was to be made by the three, or any two of them. They disagreed, and one of the arbitrators declined having any thing more to do with the matter; but the other two afterwards sent to him, for his opinion, a draft of an award. He objected to this, and stated his objections to both the others:—*Held*, that an award made by the two which differed from the one prepared, without considering the objections and without consultation or discussion with the arbitrator who had objected, was bad. *Perring* v. *Kymer*, 285.

Semble, that if the award had been made by the two immediately upon the third declining to act, and before they had again consulted him, it might have been good. *Id.*

A submission to arbitration referred the amount of loss by fire on "wool in the process of woolling, carding, scribbling, and spinning," but in other parts of the submission "raw wool" was spoken of. The arbitrator conceiving that he was not justified in taking into his consideration wool which had undergone a part of the process of manufacture, but was not at the time of the fire in any of the engines, refused to receive evidence applicable to that wool:—*Held*, that the arbitrator was justified in so doing; and the Court refused to disturb an award made on that principle. *In re Hurst*, 275.

ARREST.

The Court refused to interfere summarily to discharge a defendant out of custody, on the ground that the arrest was against good faith, in being made for the whole debt, after an engagement to receive the amount by instalments. *Udall* v. *Nelson*, 177.

A party may arrest a defendant without discontinuing a previous action commenced by serviceable process for the same cause, though within two days of the day for which the cause was set down for trial. *Burdakin* v. *Smallwood*, 187.

The Court will not discharge a defendant out of custody because it appears by the particulars of demand that the debt is barred by the Statute of Limitations. *Pottier* v. *Macdonell*, 189.

Where two bailiffs kept watching a defendant at a particular house, and had a warrant to arrest him, and in fact would have arrested him if he had endeavoured to get away, but did not produce the warrant or act on it:—*Held*, that it did not constitute an arrest; and that he might be afterwards arrested for the same debt without a judge's order. *Hender* v. *Robins*, 204.

Money given by a man to procure his liberation from an illegal arrest, may be recovered back, by an application to the Court, from the party who made the arrest who took it. *Pitt* v. *Combs*, 13.

Such an application should be made without delay; or if delay has occurred, it must be satisfactorily accounted for to the Court. *Id.*

ASSAULT.

If a collector of taxes has reason to believe, from threats used towards him by a person on whose goods he is about to distrain for payment of taxes, that resistance will be offered, he has a general right, from the nature of his office, to take a constable with him for his protection; and if such constable is assaulted under such circumstances, an indictment may be maintained, describing such assault as an assault on the constable in the execution of his duty. *Rex* v. *Clarke*, 252.

ASSUMPSIT.—See Action. Bankrupt.

The plaintiff demised a house to the defendant, who by the agreement of tenancy agreed to pay a yearly rent clear of all deductions for taxes and parochial rates; after occupying the premises some time, the defendant quitted them, leaving claims for poor's rate and land-tax unpaid, which the plaintiff as landlord was obliged to pay:—*Held*, that he could not recover the amount from the defendant in an action for money paid, because as there was no original liability on the defendant to pay, it could not be said to be money paid to his use. *Spencer* v. *Parry*, 179.

ATTACHMENT.

See Bail. Evidence. Pleading. Practice. Sheriff.

An attachment will not be granted for not obeying a judge's order which has not been made

a rule of Court, but by the same motion it may be made a rule of Court, and an attachment may be obtained for disobedience thereof. *Hinchcliffe* v. *Jones*, 337.

A motion for an attachment for not obeying a subpœna should be made at the earliest possible opportunity after the contempt has occurred. The Court, on the ground of delay, discharged a rule for an attachment for not obeying a subpœna to give evidence at a trial of an indictment for a misdemeanor on 11th *Dec.* when the application was not made until the following Trinity Term. *Rex* v. *Stretch*, 322.

Where there had not been personal service of the rule of Court and Master's *allocatur*, but copies had been left, and notice had been given of a call that would be made, the Court made a rule for an attachment against an attorney absolute, where on showing cause against the rule *nisi* he did not deny having received the papers and notice. *Bottomley* v. *Belchamber*, 362.

There must be personal service of the rule *nisi* for an attachment, though there has been personal service of the rule, for disobedience to which the rule *nisi* for the attachment issued. *Birket* v. *Holmes*, 659.

A rule to show cause why an attorney should not pay his client a sum of money, having been referred to the Master, who found a certain sum due, and made his *allocatur* accordingly, whereupon the rule was made absolute:—*Held*, that a rule for an attachment for the non-payment was not absolute in the first instance. *Ryan* v. *Farnell*, 641.

ATTORNEY.

The Court will take judicial notice who are attorneys of the Court. *Ex parte Hoare*, 211.

On a summary application against an attorney, it must appear upon the affidavits that he is an attorney of the Court. *In re Becke*, 417.

Draft of the articles of the clerkship to an attorney allowed to be inrolled, where the original was lost through the misconduct of the person who had them delivered to him to be inrolled. *Ex parte Beckenden*, 193.

If an attorney's clerk has been absent part of the five years with his master's consent, but has served on at the end of the five years, under the same articles, an equivalent additional time, he is entitled to be admitted. *Ex parte Frost*, 111.

Where the notice of admission as an attorney was given with a view to admission in Easter Term, but by mistake the name of the person with whom he resided was inserted instead of the name of the party to whom he was articled, the Court, on an affidavit of the mistake, and denying any intention to evade inquiry, allowed him to be admitted on the same notice on the last day of Trinity Term. *Anonymous*, 146.

Where a second christian name of both the master and clerk was omitted in the articles of clerkship, and the notice of intention to apply for admission described the parties by such second christian name, the Court allowed the admission on having an affidavit of the identity of the parties in addition to the usual affidavits. *Ex parte Croft*, 375.

The notice for the admission of an attorney having been omitted to be given in the K. B. office, through inadvertence, the Court allowed fresh notice to be given for admission on the last day of the following term. *Ex parte Stonehurst*, 517.

The notice for the admission of an attorney was, by the inadvertence of an agent's clerk, given in the books of the Chief Justice, but not in the books of the other judges of the Court; immediately on its being discovered the notices were given:—*Held*, that the party might be admitted on the last day of the term. *Ex parte Woolright*, 517.

Where a person wanted to go abroad to practise as an attorney, he was admitted without giving a full term's notice. *Ex parte Hulme*, 366.

Where a person put up the notices on the third day of term for his admission as an attorney on the last day of the same term, he was refused admission, though he stated particular reasons for not complying with the usual rule. *Ex parte Parsons*, 349.

Where on application for the re-admission of an attorney it was not stated that he had not practised since he last took out his certificate, the Court compelled him to pay a fine of 5*l.* besides the arrears of duty, on his re-admission. *Ex parte Stonecroft*, 368.

Rule granted to re-admit an attorney without a term's notice, where the omission to take out the certificate for the current year was the act of the agent. *Ex parte Ford*, 192.

Where by some inadvertence the necessary affidavits could not be procured for the re-admission of an attorney on the last day of the term for which he had given notice, the Court, on application the first day of the following term, refused to admit him, but allowed the notices then to be given for the last day of the same term. *Ex parte Mosley*, 331.

If an attorney has practised after he ceased to take out his certificate, but has had the penalties remitted by the commissioners of stamps, he may be re-admitted on taking out his certificate for the current year. *Ex parte Tufkin*, 516.

An application to commit a person to prison under 22 Geo. 2, c. 46, s. 11, for having acted as an attorney not being qualified, must also be to strike the agent, through whom the business was transacted, off the rolls. *In re Hodgson*, 110.

An attorney who resided at A. occasionally occupied part of a house in B., where his articled

clerk lived, the names of both being on the door. The clerk was in the habit of attending a court of requests and before magistrates, as such clerk, but deriving a profit to himself therefrom: he also conducted an appeal in the name of his master, who allowed part of the bill to be paid by a suit of clothes made for the clerk. It also appeared that several suits, issued out of K. B., had been placed in the hands of an officer to be executed, having the master's name upon them, for part of which he paid, but referred the officer to the clerk for the remainder, saying, it was the clerk's business and not his; and that as an action carried on in K. B. in the name of the master, with his knowledge and concurrence, the clerk appeared and acted as the attorney, and after verdict obtained, claimed to have the costs paid to himself, and objected to have them paid to the master:—*Held*, that this was a case within 22 Geo. 2, c. 46, s. 11; and the Court ordered the attorney to be struck off the rolls. *In re Palmer*, 55.

Where the *London* agent of an attorney residing in the country omitted for more than a year to take out a certificate for him, but afterwards a certificate was taken out but he was not re-admitted, and he continued to practise, and employed another person, ignorant of the omission regarding the certificate, as his *London* agent, but upon notice of the facts, and of his legal liability, ceased to act as an attorney, and in the next succeeding term applied to be re-admitted, and was re-admitted accordingly:—*Held*, that the new agent was not liable, under the 22 Geo. 2, c. 46, to be struck off the rolls for permitting an unqualified person to practise in his name; for though under the 37 Geo. 3, c. 91, s. 31, the omission by an attorney for a year to take out his certificate makes his admission null and void, it does not render him an unqualified person within the meaning of the 22 Geo. 2, c. 46. *In re Hodgson and Ross*, 265.

Held, also, that the country attorney was not, under the circumstances, liable to be imprisoned under that statute. *Id.*

Attornies are not bound to sue in Courts of Request, although the attachment of privilege is taken away by the Uniformity of Process Act. *Dyer* v. *Levi*, 640.

It is no cause for striking an attorney off the rolls that he has commenced several *qui tam* actions for the purpose of revenge. *Ex parte Warren*, 113.

Where in a judge's order referring an attorney's bill to be taxed under stat. 2 Geo. 2, c. 23, s. 23, the usual submission of the client to pay what is found due was omitted, the Court refused to refer it to the Master to tax the costs of the taxation, more than one-sixth having been taxed off, even though the attorney had submitted to the taxation, and a balance had been found due by him to the client. *Howard* v. *Groom*, 355.

On the taxation of an attorney's bill, very nearly one-sixth was taxed off, and afterwards a rule to refer back the bill for taxation was discharged on the merits: no objection was however made to items being inserted in the bill of costs instead of the cash account, where, if they had been inserted, more than one-sixth would have been deducted:—The Court afterwards refused, on a fresh rule, to listen to that objection. *Harrison* v. *Ward*, 353.

Items of the costs taxed in two actions and paid by the attorney, and for which he had received no specific payment from his client, are properly inserted in the bill of costs, and need not be in the cash account. *Id.*

Where an attorney agreed to save a party harmless from all costs of some suits, on his being allowed to retain half of whatever sums were recovered, the Court nevertheless ordered him, on application of the party with whom the agreement was made, to deliver his bill of costs, for the purpose of having it taxed. *In re Masters*, 348.

Such an agreement amounts to maintenance, and is illegal. *Id.*

A person who is the real plaintiff in a cause, but who is obliged to sue in the name of another, may apply to the Court to have his attorney's bill in the cause taxed. *Id.*

The Court has no power to refer an attorney's bill to taxation, at the prayer of a person who is not the original client, but who has ultimately paid the bill. *Doe* d. *Palmer* v. *Roe*, 339.

Where an action of ejectment was brought on the forfeiture of a lease by the breach of the covenants, and a compromise was come to, by which the old lease was to be surrendered and a new one granted, and the costs of the lessors of the plaintiff were to be paid, which was done, the Court refused afterwards to refer the bill of costs of the attorney to the lessors of the plaintiff for taxation. *Id.*

Where the attorney of the defendant in an ejectment went to the lessor of the plaintiff (a female) who had succeeded in the ejectment, and in the absence of her attorney obtained her signature to a paper, which he took away, though at the time she said she wished for time to consult her attorney, the Court ordered it to be given up to be cancelled. *In re Ann Oliver*, 79.

Where an attorney having the custody of certain papers has been ordered by the Court of Chancery, in which he has been made a party to a suit, to deliver them into the custody of the officer of that Court; the Court of King's Bench will not direct him to deliver them up, though on the application of a party interested in them, because it would render the attorney liable to an attachment for non-compliance with the order of the Court of Chancery. *In re Walmesley*, 88.

Where an agreement for a lease was in the hands of an attorney, and it was doubtful whether he

acted as attorney for both the parties to the agreement, in drawing it up; the Court allowed one of the parties to inspect and take a copy of it. *Ex parte Bretter*, 212.

The Court refused a rule made on the behalf of the Crown, calling on an attorney to pay over to the receiver of stamp duties a sum of money which the attorney had received from his client, an executor, for the purpose of paying legacy duty, but which he had not in fact paid. *In re Fenton*, 310.

The Court will not order an attorney to repay a sum of money paid to him voluntarily under an agreement to give him one-third of what was recovered in an action, the application not having been made until 13 years after the money was paid. *Ex parte Yeatman*, 510.

The Court refused to order an attorney to deliver up a deed which had been given him by one of the parties to it to get executed by his client, who was to be another party. *Ex parte Smart*, 526.

An attorney got into his hands the proceeds of stock belonging to his client, sold out for the purpose of being invested on mortgage: he kept the money in his hands, paying interest to his client. To applications to re-invest the stock, he at first made evasive answers, but ultimately promised to do so. At length a rule was by consent made absolute upon him to re-invest on or before a particular day, and pay the costs, or in default that an attachment should issue. On the day after the appointed day, a fiat in bankruptcy issued against him, under which he obtained his certificate: no service of the rule and *allocatur* took place before the bankruptcy:—*Held*, on the ground that the circumstances established a case of fraud, that the bankruptcy afforded no answer to a motion for an attachment: and the Court accordingly granted an attachment. *In re Newberry*, 575.

Independently of the question of fraud, the attachment should issue, as it is only giving effect to the former rule. *Per* Lord *Denman*, C. J. *Id.*

Where an attorney received money to pay over to a proctor for probate of a will, the Court refused to interfere summarily to make him account for it. *Ex parte Cohen*, 211.

Where, in an order to refer an attorney's bill for taxation, the usual undertaking to pay the amount when taxed is omitted; the Court will not grant an attachment for non-payment in pursuance of the Master's *allocatur*. *Ex parte Ward*, 212.

The executor of a defendant who had expressed his satisfaction with his attorney's bill, and had made a payment on account, may yet have it referred to be taxed, even after a lapse of four years. *Woollaston* v. *Weston*, 366.

A rule *nisi* against an attorney to answer matters in an affidavit, cannot be moved for on the last day of term. *In re Turner*, 217.

AUCTION.—See SALE.

AWARD.—See ARBITRATION.

BAIL.

Where a defendant has paid the debt and 10*l.* for costs to the sheriff, in lieu of bail, under 43 G. 3, c. 46:—*Held*, that he has, under 7 & 8 G. 4, c. 71, till the day for perfecting special bail, to pay in the additional 10*l.* for costs. *Stafford* v. *Love*, 195.

And where, previous to that day, a *bonâ fide* correspondence to settle the action commenced, which did not terminate until after that day, and on the termination the defendant paid in the 10*l.* additional:—*Held*, that the plaintiff was not entitled to have the debt and costs paid out of Court to him. *Id.*

Time to justify bail, on account of the illness of one of the bail, refused, because it did not sufficiently appear on the affidavit he was really ill. *Gablentz's Bail*, 111.

Where there has been delay in applying to the Court to have a bail-bond set aside, which has arisen from compliance with the request of the plaintiff:—*Held*, that it could not be objected that the application was not made in a reasonable time. *Gould* v. *Williams*, 344.

A defendant who has been arrested on a *capias* since the Uniformity of Process Act, and given a bail-bond, cannot discharge the bail-bond by a surrender into actual custody within eight days after the arrest. *Hodson* v. *Mee*, 398.

In an action commenced by original, the declaration was amended under an order, by the addition of new counts, and the damages being increased:—*Held*, that the liability of the bail upon their recognizance was not affected. *Taylor* v. *Wilkinson*, 451.

An affidavit of justification of bail describing one as of a parish which contained 7000 inhabitants, but not saying of any street, is sufficient. *Hunt's Bail*, 520.

Stating the bail was possessed of property to the requisite amount "over and above his just debts," but omitting the words "what will pay," is also sufficient. *Id.*

Stating he was not bail in any other action for any defendant, is also sufficient. *Id.*

Where a bail-bond, in reciting the writ of *capias*, stated that "a copy of the writ was duly delivered to ——," omitting the name of the defendant, and likewise omitted his name in the statement of the condition of the bond, the Court, in an action of escape brought against the sheriff, would not supply the deficiency. *Holding* v. *Raphael*, 571.

A defendant having given notice of bail according to the rule of T. T. 1 W. 4, is bound to

adopt the form of affidavit of justification given in that rule. *Penson's Bail*, 663.

BANKRUPT.

See ATTORNEY. PLEADING. SALE. SLANDER.

A notice of an act of bankruptcy given to the *Bank of England*, in *London*, in time for communication to be made to the branch banks, is sufficient to bind the bank, in respect of transactions with the bankrupt, at any of the branch banks of that establishment. *Willis* v. *Bank of England*, 620.

The assignees of a bankrupt may recover in trover, from the *Bank of England*, the amount of bank post bills changed by an agent of the bankrupt at a branch bank, after notice of the act of bankruptcy given to the Bank in *London*, in sufficient time to have been communicated to the branch bank. But they cannot recover from the Bank the amount of a similar bill changed by a *bonâ fide* holder for value after the act of bankruptcy, but without notice, and by him paid into the Bank. *Id.*

An action was referred to an arbitrator, and the defendant paid a sum awarded against him, but not the costs of the cause, as they had not been taxed. A fiat then issued against him, after which the plaintiff taxed his costs:—*Held*, first, that those costs were provable under the fiat; secondly, that the defendant having paid them to the sheriff on an attachment before he obtained his certificate, the Court would order them to be repaid to him afterwards, the sheriff having still the amount in his hands. *Bishop* v. *Leigh*, 664.

BASTARD.—See GUARDIAN.

BILL OF EXCHANGE AND PROMISSORY NOTE.

See AFFIDAVIT. LIMITATIONS, STATUTE OF. PAYMENT. PLEADING.

In an action by an indorsee against the acceptor of a bill of exchange, the Court refused to allow a plea denying the drawing, as well as a plea denying the acceptance. *Gilmore* v. *Hague*, 523.

Where, to a plea of no consideration, in an action on a bill of exchange, there is a replication that consideration was given, setting it out under a *scilicet*, and concluding to the country, no new matter is alleged so as to make it necessary for the plaintiff to prove the particular consideration set out. *Low* v. *Burrows*, 12.

Where the buyer of goods paid for them by his own acceptance, and after the bill had been accepted the seller altered the date of it, and thereby vitiated it:—*Held*, that by so doing he did not preclude himself from suing for the original debt; and consequently that he might recover for the goods sold. *Atkinson* v. *Hawdon*, 77.

In an action by the indorsee against the indorser of a note made specially payable at a particular place, where the allegation of presentment in the declaration was general, but no objection was taken on account of the variance at the trial:—*Held*, that it was no ground for a new trial. *Trinder* v. *Smedley*, 164.

If the drawer or indorser of a bill of exchange or promissory note receives due notice of its dishonour from any person who is a party to it, it enures for the benefit of all, and is sufficient to make him liable upon it, though the party who gives the notice be not the holder, or the agent of the holder, at the time. *Chapman* v. *Keene*, 165.

In an action on a bill of exchange by indorsee against drawer, the only evidence of notice of dishonour was a statement made by the defendant in conversation with a witness, in which he said, "I have several good defences to the action; in the first place, the letter (containing notice of dishonour) was not sent to me in time." This statement was left to the jury as evidence of due notice of dishonour:—*Held*, by *Littledale*, J., *Patteson*, J., and *Coleridge*, J. (Lord *Denman*, C. J., *dissentiente*), that the jury were not warranted in presuming that due notice had been given. *Braithwaite* v. *Coleman*, 229.

Where a person takes an indorsement of a promissory note from the payee, with notice that the payee was indebted to the maker in a greater amount than that in the note, on separate transactions:—*Held*, that the indorsee could not recover on the note, except to the amount of some advances he had made on the security of the note before he had the notice. *Goodall* v. *Ray*, 333.

In an action to recover the amount of a check, where the defendant does not deny giving the check, but pleads that it was given for a gambling transaction, the plaintiff is not bound to make it part of his case, nor to produce it for the purpose of the defendant giving it in evidence, unless he has received notice to produce it. *Reeves* v. *Gambell*, 567.

An agent for the sale of goods was authorized to draw bills on the purchasers at the usual credit; and by the course of his employment he was to transmit them indorsed to his principals. He sold goods at a credit beyond the usual period, and drew for the amount; but instead of transmitting them to his principals, he used them for his own purposes. They got into the hands of the defendant, a bill-broker, who discounted them:—*Held*, that proof of these facts alone did not afford sufficient evidence of fraud connected with the defendant, to give the principals a *primâ facie* right to recover the amount of the bills from him as money had and received, and make it incumbent on him to show that he gave full value for the bills. *Davis* v. *Willis*, 679.

Two joint and several notes were given to come due at different dates. After one of them had become due, the holder received from one of the makers a sum exceeding the amount of the note

which was due, and exceeding his share of the aggregate amount of the two notes. This sum was received in discharge of that maker from whom it was received; and the holder accordingly gave up to him the note that was due, and erased his name from the other note:—*Held*, that such maker was discharged from all claim on the remaining note; and that thereby the other maker was also discharged. *Nicholson* v. *Revell* 756.

Quære, whether the holder of a note, merely erasing the name of one of two joint and several makers, is a discharge of the other. *Id.*

A discharge by a debtee of one joint and several debtor, is a discharge of all. *Id.*

BRIBERY.

To constitute the offence of bribery at an election, under 2 Geo. 2, c. 24, s. 7, by "*corrupting* a voter to give his vote," by giving him a bribe, it is not necessary that the voter should vote in accordance with the wishes of the person who gives the bribe. The offence is complete, so far as the corruptor is concerned, by the act of giving the money, whether the voter have at the time of receiving it any intention of voting according to the bribe or not. *Henslow* v. *Fawcett*, 125.

BRIDGE.—See HIGHWAYS.

An infant whose guardian is in possession of an estate, in respect of the tenure of which there is a liability to repair a bridge, is not liable to an indictment for non-repair, either as owner or occupier. *Rex* v. *Sutton*, 428.

A guardian in soccage is liable. *Id.*

Quære, whether an owner who is not in occupation is liable. *Id.*

BUILDING ACT.—See EXECUTORS.

CANAL.—See POOR RATE. STATUTE.

CERTIORARI.—See WAY.

The notice required by 13 Geo. 2, c. 18, s. 5, of intention to move for a *certiorari* to remove an order of justices, must be made six days, computed one day exclusive and one day inclusive, before the rule *nisi* is applied for; therefore, where notice was given on the 20th for a motion on the 25th, and the motion was made on that day, it was held insufficient, and the rule was discharged, but without costs. *Rex* v. *The Justices of Cumberland*, 16.

Certiorari to remove an indictment found at sessions, on the ground that the defendant was a magistrate, refused to a prosecutor. *Rex* v. *Fellows*, 648.

The defendant cannot have a *certiorari* to remove a conviction for being found in pursuit of game, under 1 & 2 W. 4, c. 32. *Rex* v. *Hester*, 650.

In the 1 & 2 W. 4, c. 32, s. 45, (the Game Act,) is a general enactment that no summary conviction, in pursuance of the act, shall be removed by *certiorari*:—*Held*, that a writ of *certiorari* might nevertheless be issued at the instance of a private prosecutor. *Rex* v. *Boultbee*, 713.

CHURCHWARDEN.

A rule for a mandamus to an archdeacon to swear in a churchwarden, is absolute in the first instance. *Rex* v. *Archdeacon of Lichfield and Coventry*, 463.

COMMITMENT.—See BANKRUPT.

COMPENSATION.

Where an assessment of compensation had been made to a claimant under the 3 W. 4, c. 46, (Greenwich Railway Act,) in one entire sum, and he was possessed of a leasehold interest as well as other subjects of compensation, the Court refused an application on behalf of the Company for another assessment to be made, on the ground, that as the value of the leasehold property was not assessed separately according to the act, it could not be known what would be the proper *ad valorem* stamp-duty to be affixed to the deed of assignment: the Court saying, that the difficulty would be obviated by putting on the deed a stamp applicable to the whole sum assessed, and reciting all the circumstances of the case. *In re The London and Greenwich Railway Company*, 81.

COMPOSITION WITH CREDITORS.

See BANKRUPT.

CONSIDERATION.—See SMUGGLING.

CONSTABLE.—See ASSAULT.

In such a case there must be a demand of a copy of the warrant before any action brought against the constable. *Barrons* v. *Luscombe*, 457.

Quære, whether magistrates have in any case a right to withdraw a warrant after they have once issued it. *Id.*

CONSTRUCTION OF DEEDS.

See INSURANCE.

CONTEMPT.—See BANKRUPT.

CONTRACT.

See AGREEMENT. EVIDENCE. PLEADING.

CONTUMACE CAPIENDO.

Semble, that it ought to appear upon the warrant granted upon a writ of *contumace capiendo* that the suit was for a subject-matter which was exclusively within the jurisdiction of the Spiritual Court: therefore when a warrant merely stated that the suit was for slander, without showing that it was a slander, of which alone the Spiritual Court had cognizance, the Court granted a rule to show cause why the party should not be discharged out of custody. *In re Gale*, 59.

Where a party in custody under writs of *contumace capiendo* applied for a rule to show cause why they should not be set aside for irregularity, with costs, and after the rule obtained also applied to the Chancellor, who decided that one of them was bad, and ordered the others to stand over for argument, the Court, on showing cause, enlarged the rule, with a stay of proceedings. *Rex* v. *Ricketts*, 64.

CONVICTION.—See FORCIBLE DETENTION.

COPYRIGHT.—See PLEADING.

No action can be maintained for pirating a print, where the date of the first publication has not been engraved on the plate according to the provisions of 8 Geo. 2, c. 13, s. 1: the performance of the directions of the statute in that respect being a condition precedent to the right of property vesting in the proprietor. *Brookes* v. *Cock*, 129.

COPYHOLD.—See DEVISE.

A custom in a manor required that the consent of the husband to a surrender by his wife should be expressed in the surrender and admission; a surrender was made by a wife at a general court, and the husband was present at that court, but in the surrender his consent was not expressed:—*Held*, that the surrender was inoperative. *Held also*, that the Court could not infer from circumstances that the husband's consent had been given. *Doe* d. *Shelton* v. *Shelton*, 287.

Semble, that such a surrender would not be good, even if the husband were divested of all property at the time. *Id.*

CORONER.—See PRACTICE.

CORPORATION.

King Edward 1. by charter granted to the borough of *Carnarvon*, that the constable for the time being of the castle of *Carnarvon* should be mayor of the borough, to be sworn in a manner prescribed in the charter. The Marquis of *Anglesea* was appointed constable of the castle of *Carnarvon* by George 3: he continued in that office until *January*, 1831, under that appointment, and was then re-appointed by William 4:—*Held*, that his title was not complete, as mayor of the borough, until he had taken the oath required by the charter; and, consequently, that an appointment by him of the defendant as deputy mayor was invalid. *Rex* v. *Roberts*, 444.

The grant by William 4 was a new appointment to the office, and not merely a confirmation of the old appointment of the Marquis of *Anglesea*. *Id.*

Quære, whether an officer in the situation of the constable of the castle of *Carnarvon*, can appoint a deputy to be mayor of the borough; and if so, whether the appointment must be by deed. *Id.*

In an action by an attorney for his work and labour as such against a corporation of which he was a burgess, the Court refused to grant him inspection of the books of the corporation. *Stevens* v. *Mayor of Berwick*, 517.

Under the 5 & 6 W. 4, c. 76, s. 8, places which are made parts of boroughs, are made so for all purposes; therefore, since the passing of that act, county justices have no jurisdiction over places which are included within the metes and bounds of a borough. *Rex* v. *The Justices of Gloucestershire*, 682.

In an action by a corporation, a witness stated on the *voire dire* that he had been a member of the corporation, but that he was disfranchised:—*Held*, that the answer was not conclusive, so as to preclude further inquiry as to the mode of disfranchisement. *The Bailiffs of Godmanchester* v. *Phillips*, 686.

He stated, in answer to such inquiry, that he was disfranchised by having resigned at a corporate meeting; he did not know the number present on that occasion, but referred to the corporation books which were in Court:—*Held*, that it was competent to refer to those books, to show that there was not a sufficient majority present on that occasion, so as to invalidate the resignation, and show the witness to be still a member of the corporation. *Id.*

A charter granted to a corporation, consisting of two bailiffs, and twelve assistants and commonalty, or the greater part of them, of whom the bailiffs for the time being shall be two, to do corporate acts:—*Held*, that the necessary majority must consist of the two bailiffs, and a majority of twelve assistants; and therefore that a meeting, at which the two bailiffs and six assistants were present, was not a good corporate meeting. *Id.*

COSTS.

See ATTORNEY. EXECUTOR. HUSBAND AND WIFE. INTERPLEADER. NEW TRIAL. SET-OFF. WITNESS.

The exemption of a plaintiff executor from costs, under 3 & 4 Will. 4, c. 42, s. 31, after a verdict for the defendant, is a matter entirely of discretion; and the decision of a judge upon the point is final: the power of the judge being under that statute co-ordinate with that of the whole Court. *Maddox* v. *Phillips*, 251.

In assumpsit on promises to an executor, the defendant on a nonsuit is entitled to his costs, under the 23 Hen. 8, c. 15; and *semble*, that the Court has no jurisdiction to deprive him of them by the 3 & 4 Will. 4, c. 42, s. 31. *Spence* v. *Albert*, 7.

The burden of making out an exemption from costs, under 3 & 4 Will. 4, c. 42, s. 31, on the part of an executor plaintiff who has failed in his action, lies on him; because the exemption is an exception from the general rule under which executors who are plaintiffs and have failed are liable for costs. *Farley* v. *Briant*, 775.

It is not sufficient for such a plaintiff to show that the action was brought *bonâ fide* under legal advice to try a doubtful point of law, which it was necessary to have decided in order to obtain an equitable administration of assets in a creditor's suit. *Id.*

The conduct of the defendant after action brought, relative to the mode of conducting the defence, will not be considered by the Court in exercising their discretion. *Id.*

Where a jury, not being able to agree upon a verdict, were dismissed by the judge, but without the consent of the parties, the Court refused to grant the plaintiff, who obtained a verdict at a second trial, the costs of the first. *Seally* v. *Powis*, 118.

The 74th rule H. T. 2 Will. 4, extends to give the defendant the costs of an issue found for him on a demise in ejectment, which the lessor of the plaintiff abandoned at the trial, though the evidence was equally applicable to the demise, upon which he succeeded. It is not necessary under the terms of the rule, that the costs should be confined exclusively to the issue found for the defendant; but the question of amount is entirely a question for the master, with which the Court will not interfere. *Smith and Payne* v. *Webber*, 10.

Where, in case for libel, on the general issue, the jury found for the plaintiff, and also found as a fact, that a great part of the declaration did not apply specifically to the plaintiff; though there were *inuendos* by which it was endeavoured to connect him with the matter complained of: —*Held*, that the defendant was entitled to the costs of that part. *Prudhomme* v. *Fraser*, 5.

In trespass, four defendants pleaded separate pleas by the same attorney; one the general issue and a justification, upon both of which he was found guilty; another, similar pleas, but was only found guilty on the general issue; and the two others the general issue only, upon which they were acquitted:—*Held*, that the costs payable to the three last might be set off against the costs which the plaintiff was entitled to recover from the first. *Lees* v. *Kendall*, 316.

In trespass for assault, battery, and false imprisonment, and tearing the plaintiff's clothes, there was issue upon a new assignment to a plea of *son assault demesne*. The jury found a verdict for the plaintiff with one shilling damages:—*Held*, that the judge had no power to certify under the 43 Eliz. c. 6, to deprive plaintiff of costs. *Bone* v. *Dawe*, 311.

Where in such a case the judge had certified, the Court granted a rule on the Master to tax the plaintiff his costs, notwithstanding the certificate. *Id.*

In an action for the diversion of a watercourse, where a plea of not guilty was found for the plaintiff, but a plea denying the right to the water, for the defendant: — *Held*, that the defendant was entitled to the general costs of the cause. *Frankum* v. *Earl of Falmouth*, 337.

Quære. Whether under the statute 7 Geo. 4, a prosecutor under recognizances to prosecute at the sessions, who prosecuted at the assizes, is entitled to costs. *Rex* v. *Jeyes*, 325.

Semble, that the statute meant to give costs to those parties only who have previously gone before a magistrate. It does not apply to cases where an indictment is preferred after a magistrate has dismissed the complaint. *Per Littledale*, J. *Id.*

The Court will not interfere where a judge has granted a certificate under the stat. 43 Eliz. c. 6, to deprive the plaintiff of costs, except upon the question whether he had power to grant the certificate. *Cann* v. *Facey*, 482.

An application for security for costs may be granted after plea pleaded. *Fletcher* v. *Lew*, 430.

Costs of increase form no integral part of the suit, as they are awarded by the Court in consequence of the damages recovered by the plaintiff, and form the subject of a distinct and separate adjudication. *Taylor* v. *Wilkinson*, 451.

In ejectment, where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the defendant succeeding as to the chief question in dispute:—*Held*, that the defendant was entitled to have his costs as to the part found for him set off against the costs of the lessor of the plaintiff, under the rule H. T. 2 Will. 4, I. 74. *Doe* d. *Errington* v. *Errington*, 502.

The Court will not appoint any fixed time before which a plaintiff is to give security for costs. *Broughton* v. *Jeremy*, 525.

The Court will not compel a plaintiff to give security for costs, because he was gone to serve in a foreign army in a civil war. *Frodsham* v. *Myers*, 526.

Where a verdict is found for the plaintiff on some counts and for the defendant on other counts, and the questions raised on the counts found for the defendant are submitted for the opinion of the Court, in the form of a special case, on which the defendant obtains judgment, the Master, in taxing costs, should allow the costs of the special case to the defendant. *Gosbell* v. *Archer*, 559.

The Court will not deprive a plaintiff of his costs under the 43d Eliz., because the action might have been brought in a Court of Requests, the trial having been before the sheriff on a writ of inquiry. *Claridge* v. *Smith*, 667.

A defendant cannot have leave to enter a suggestion to deprive the plaintiff of his costs, under a Court of Requests' Act, which is repealed, though the action was commenced before the act was repealed. *Bliss* v. *Johnson*, 648.

A defendant is not entitled to double costs under the *Middlesex* Court of Requests' Act, an issue on the plea of tender having been found for him, and a verdict for the plaintiff under 40*s.* beyond the amount tendered. *Downes* v. *Ray*, 649.

In case, for libel, there was a plea of not guilty, on which the verdict was found for the defendant, and several pleas of justification, on which the jury found for the plaintiff, because the defendant offered no evidence in support of them:—*Held*, that though the defendant was entitled to the general costs, the plaintiff was entitled to the costs of the issues on the pleas of justification, including both the costs of the pleadings, and of evidence provided to rebut them. *Spencer* v. *Humerton*, 700.

The practice that where a rule is moved with costs, and is discharged generally, the costs are given, applies to rules for irregularity only. *Drinker* v. *Pascoe*, 651.

A rule having been discharged without any mention of costs, though it was the intention of the Court to give the costs, and the rule having afterwards been drawn up in form as discharged with costs, the Court, the following term, refused to alter it. *Id.*

An old Court of Requests' Act gave defendants a particular remedy for costs, where *upon the trial* the amount due was found to be under 40*l.*:—*Held*, this extended to trials before the sheriff, under the late stat. 2 & 3 Will. 4, c. 42, ss. 17, 18. *Croad* v. *Harris*, 657.

Security for costs may be applied for at any time before plea pleaded; even after the defendant has had an order for time to plead. *Gurney* v. *Key*, 203.

Upon a motion to allow the defendant his costs under the 43 Geo. 3, c. 46, the Court will refer to the judge's notes taken at the trial, in order to supply the omission in the defendant's affidavit of the amount recovered by the verdict; and the verdict of the jury in a question of a disputed account must be taken to be almost conclusive. *Van Neuzel* v. *Hunter*, 273.

On a motion for costs under 43 Geo. 3, c. 46, the Court will not receive affidavits to show that the verdict was wrong. *Twiss* v. *Osborn*, 274, n.

The defendant is not entitled to costs under 43 Geo. 3, c. 46, s. 3, where there has been a reference to arbitration entered into before verdict, even where, in the order of reference, there is a special direction "that the costs of the action, of the reference, and of the award, are to abide the event of the suit in like manner as upon a verdict." *Holder* v. *Raith*, 8.

The power of the Court under 43 Geo. 3, c. 46, s. 3, to allow the defendant his costs, where he had been arrested without reasonable or probable cause, was given to an arbitrator on a cause being referred, but the arbitrator made no order on the subject:—*Held*, that the Court could not afterwards make the order. *Greenwood* v. *Johnson*, 184.

To entitle the defendant to costs under 43 Geo. 3, c. 46, s. 3, where the difference between the sum for which he was arrested and that recovered is small, the defendant must show clearly to the Court that the arrest was without reasonable or probable cause. *Payley* v. *Barker*, 208.

COURT OF REQUESTS.—See COSTS.

COVENANT.—See EXECUTOR. DEBT.

CRIMINAL LAW.—See ASSAULT.

CRIMINAL INFORMATION.

See JUSTICE. OVERSEER.

CUSTOM.—See SEA.

In trespass *quare clausum fregit*, on a plea of a right over the *locus in quo*, a witness for the plaintiff in cross-examination spoke of the exercise of the same right by other persons beside the defendant: on his re-examination he gave evidence of the right over places other than the *locus in quo*; and the jury found for the plaintiff: *Held*, that the improper reception of this evidence

was no ground for a new trial on the part of the defendant. The judge ought to have been requested to expunge it from his notes at the trial. *Blewitt* v. *Tregonning*, 432.

Where in trespass there is a plea of prescription, and several pleas claiming under non-existing grants from different persons, and the evidence is usage, without showing any time at which such usage commenced, it is no misdirection to tell the jury there is no evidence on the pleas of non-existing grants. *Id.*

In trespass *quare clausum fregit*, there was a plea claiming a right by custom, another by prescription, and several others by non-existing grants. The judge called the attention of the jury to the nature of the mode of claim, and told them, that in order to support the prescription exclusive enjoyment was necessary:—*Held*, that it was no misdirection, as the expression "exclusive" was used to point their attention to the different nature of the claim by custom as a public right, and by prescription as a private right. *Id.*

Quære, whether the same person can have a right by custom, and a prescriptive right to do the same thing. *Id.*

DAMAGES.—See Sheriff, 2.

Where in trespass for a forcible entry into a mansion-house under colour of making a distress for rent, and remaining there for three or four days, the defence was *lib. ten.* and a justification under a distress for rent, to enforce a claim to the property, for which there was not the slightest foundation, and the jury gave 1000*l.* damages; the Court refused to grant a new trial on the ground of excessive damages. *Bland* v. *Bland and others*, 167.

DEBT.

An action of debt by a covenantee against the devisees of a covenantor will not lie under the statute 3 Wm. & Mary, c. 14, where the covenantor is only a surety, and the breach of covenant did not take place in his life-time. *Farley* v. *Briant*, 299.

DEBTOR AND CREDITOR.

See Assumpsit.

DEED.

See Covenant. Insolvent. Tithes.

A demise of an incorporeal hereditament can only be valid by deed; a demise by parol of a right of hunting and sporting, together with a messuage, is therefore void. *Bird* v. *Higginson*, 61.

If a man executes a deed, in which a former deed is recited to which he is a party, but which he has not executed, he does not thereby bind himself by all the conditions of the former deed in the same manner as if that also had been executed by him. *Doe* d. *Shelton* v. *Shelton*, 287.

DEMURRER.—See Practice. Pleading.

DEPOSIT.—See Bail.

DETINUE.

In detinue for several things, the Court will not, on motion, assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff. *Philips* v. *Hayward*, 108.

DEVISE.

See Copyhold. Debt. Will.

Devise by a testator, describing himself as of *Leverington*, of "all and singular my messuages, lands, tenements and hereditaments, of what tenure soever the same may be, situate, lying, and being at *Leverington* aforesaid, and in *Wisbech St. Peter's*, and *Wisbech St. Mary's*," to trustees, one of whom he described as of *Leverington Parson Drove*. The parish of *Leverington* included a chapelry called *Leverington Parson Drove*, and the testator had lands situate in *Leverington*, as well within that portion of it called *Leverington Parson Drove* as the other:—*Held*, that land situated in *Leverington Parson Drove* passed by the will. *Doe* d. *Edwards* v. *Johnson*, 439.

A devise was made to *J.* of the messuage or tenement wherein the testator resided, with the offices and other edifices and buildings, yards and gardens to the same adjoining, and all the several closes, &c. called by the names, &c. with the appurtenances, part of the farm and lands then in his own occupation. A further devise was made to *B.* of all other the testator's closes, &c. in the same place, with their appurtenances, except what he had before devised to *J.* Several cottages adjoining the house in which the testator resided had been purchased together with it by him, but had been separated by a wall, and were not at the time in his occupation:—*Held*, that they passed by the devise to *J.*: *held*, also, that evidence of declarations by the testator, made at the time of giving instructions for, and executing his will, were inadmissible for the purpose of showing that he intended the cottages to go to *B.* *Doe* d. *Preedy* v. *Holton*, 328.

A devise to a woman, "her heirs and assigns for ever, with the intention that she may enjoy the same during her life, and by her will dispose

of the same as she thinks proper," gives an estate in fee. *Doe* d. *Herbert* v. *Lewis*, 231.

DISCONTINUANCE.—See PLEADING.

DISTRESS.

See JUSTICES. LANDLORD AND TENANT. PLEADING. POOR. SETTLEMENT. SEWERS.

A promissory note given by a tenant to his landlord on account of rent due, without there being any distinct agreement between the parties that it shall operate as a suspension of the right to distrain, has not that effect without it should be paid. *Davis* v. *Gyde*, 50.

If a note given with such an agreement would have the effect of suspending the right to distrain, the agreement must be specially pleaded in bar to the avowry, as well as the fact that the note was given on account of the rent. *Id.*

A promissory note given by a tenant to his landlord on account of rent due, is no extinguishment of the right to recover the amount by distress, until it is paid. *Id.*

EASEMENT.

A party may so alter the mode in which he has been permitted to enjoy a right to light and air, as to lose the right altogether. *Garritt* v. *Sharp*, 220.

ECCLESIASTICAL LAW.

A prohibition to an Ecclesiastical Court, in a cause which is clearly of ecclesiastical cognizance, does not lie where there has been an irregularity in the practice. *Ex parte W. H. Carmichael Smyth*, 417.

The only instances in which the temporal courts can interfere to prohibit any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court. *Id.*

Under 53 Geo. 3, c. 127, s. 7, the jurisdiction of the Ecclesiastical Court is not taken away in all cases where the amount of church-rate claimed does not exceed 10*l.*, only in those cases where the validity of the rate, and the liability to pay, are not disputed. *Ricketts* v. *Bodenham and others*, 735.

A prohibition does not lie after sentence in a suit in the Ecclesiastical Court, for a church-rate for less than 10*l.* *Id.*

A prohibition does not lie to an inferior court after sentence, unless the want of jurisdiction be apparent on the face of the proceedings. *Id.*

EJECTMENT.—See INSOLVENT.

An acknowledgment by tenant in possession of the receipt of the declaration in ejectment made on the first day of term, 12 *Jan.* but not saying when it was received, is not sufficient to make good a service on his son on the 10th *Jan.* on the premises. *Doe* d. *Martin* v. *Roe*, 46.

Land was devised in 1774 by a man to his wife in fee; and after having married again, she lived on the property with her second husband for nine or ten years, and then they left it and went to reside elsewhere, and were never afterwards in possession, but under what circumstances they left was not explained. The wife died in 1828, before her husband, who survived until 1832:—*Held*, in ejectment, that the heir of the wife was barred by the adverse possession of above forty years; though the wife was always under the disability of coverture, and the husband had a tenancy by the courtesy during his life, and it was admitted that no fine had been levied. *Doe* d. *Corbyn* v. *Branston*, 162.

Rule that the service of a declaration in ejectment on the son of the tenant, should be a good service, made absolute; where the affidavit of the tenant, on showing cause, did not deny having received the declaration from his son. *Doe* d. *Watts* v. *Roe*, 199.

Where the Christian name in the notice to a declaration in ejectment is incorrect, and there is an affidavit that the person served is the person intended, it is sufficient. *Doe* d. *Frost* v. *Roe*, 217.

A memorandum at the back of a declaration in ejectment of the service four years back, in the hand-writing of a person who had since left the country:—*Held*, not sufficient to allow judgment to be entered up against the casual ejector. *Doe* d. *Twisden* v. *Roe*, 218.

A tenant who has been served with a declaration in ejectment, cannot move to stay proceedings until the costs of a former ejectment, in every way similar, are paid, before he has entered into the consent rule. *Doe* d. *Crockett* v. *Roe*, 351.

Rule for judgment against the casual ejector refused, where the house was found shut up three days before the term, and the declaration was fixed on the door, it appearing that the tenant was in the habit of shutting up the house and staying away for several days together. *Doe* d. *Roupel* v. *Roe*, 367.

Where a tenant in possession was very unwell, and afterwards died, and a declaration in ejectment was served on a person at the house where he was staying on the day of his death, it is not a good service. *Doe* d. *Hartford* v. *Roe*, 352.

Where three sisters lived together, and there was service of a declaration in ejectment on one of them by delivery to the other two the day before term commenced, the Court granted a rule *nisi* for judgment against the casual ejector. *Doe* d. *Grimes* v. *Roe*, 369.

Service of a rule to compute at a house where letters were directed to be left for the defendant by a notice affixed to the house where he had lately been residing, *held* sufficient. *Provis* v. *Cantley*, 365.

An affidavit of the service of a declaration in ejectment must state that the party served is tenant in possession. *Doe* d. *Talbot* v. *Roe*, 367.

The affidavit of service of a declaration in ejectment on an administratrix must call her tenant in possession, and state that the property was leasehold. *Doe* d. *Rigby* v. *Roe*, 368.

Where the notice at the foot of a declaration in ejectment contains the names of many tenants, it is sufficient that the copy served on each should contain the name of that one only. *Doe* d. *Field* v. *Roe*, 516.

In ejectment, if the tenant resides abroad, service on an agent who resides on the premises is sufficient. *Doe* d. *Treat* v. *Roe*, 526.

Where there was service in ejectment on the daughter of the tenant in possession, and he on the first day of term acknowledged the receipt of the declaration, but not that he had received it before the term:—*Held*, that it was not sufficient. *Doe* d. *Harris* v. *Roe*, 372.

Where service of a declaration in ejectment was made at a house where it was sworn it was believed the tenant was, but was denied for the purpose of avoiding the service, the Court granted a rule *nisi* for judgment against the casual ejector. *Doe* d. *Turncroft* v. *Roe*, 371.

Where there was service of a declaration in ejectment on the wife of a brother of the tenant on the premises, who afterwards said she should go and see the tenant, and she next day left the premises, the Court granted a rule *nisi* for judgment against the casual ejector. *Doe* d. *Hubbard* v. *Roe*, 371.

Service of a declaration in ejectment on the mother of the tenant on the premises, is not sufficient even for a rule *nisi* for judgment against the casual ejector. *Doe* d. *Mitchell* v. *Roe*, 646.

Service on the wife at her husband's house, not being part of the premises, is sufficient. *Id.*

Rule for judgment against the casual ejector granted on an affidavit stating that the deponent had heard a person read and explain the declaration in another room to some one, whom he was told was the tenant, and was bedridden. *Doe* d. *Tucker* v. *Roe*, 671.

Rule *nisi* for judgment against the casual ejector granted, the declaration having been read and explained to the tenant, who refused to take it, whereupon it was served on her son. *Doe* d. *Grimes* v. *Roe*, 671.

Rule *nisi* for judgment against the casual ejector granted, where, on the service of the declaration, it was not explained to the tenant, who appeared to understand it. *Doe* d. *Downes* v. *Roe*, 671.

Rule for judgment against the casual ejector refused, where it had been served on an agent of a mortgagor on the premises, and on his clerk at another place. *Doe* d. *Sturch* v. *Roe*, 672.

An affidavit in support of a rule from the tenant in ejectment to confess lease and entry only, without ouster, on account of a question of joint-tenancy being likely to arise, must show that the tenant is interested in the question. *Doe* d. *Wills* v. *Roe*, 668.

Where in ejectment on two demises in separate counts, a verdict was taken for the plaintiff on one, and for the defendant on the other, with leave to move to enter it on a point of law, and speedy execution was given to the plaintiff:—*Held*, that his having accordingly issued execution on the first count, was no bar to his also having judgment on the other. *Doe* d. *Bank of England* v. *Chambers*, 749.

ERROR.—See PRACTICE.

ESCAPE.—See BAIL. SHERIFF.

ESTATE.

Where a lease for years, determinable on lives, was granted in 1732, and in 1784 the same lessor granted a similar lease of the same premises to another lessee, who always afterwards paid rent: and another person, who was in possession at the granting of the second lease, claimed to be entitled to the estate, on the ground that one of the lives in the first lease was in existence, and continued to hold it until his death in 1811:—*Held*, that he had no adverse possession to give him the freehold. *Held* also, that his widow, who continued to hold after his death in the same manner until she died in 1827, had only a claim on the continuation of the estate which her husband had, and therefore acquired no right by adverse possession. *Rex* v. *Axbridge*, 74.

EVIDENCE.

Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself: therefore where the lessee of a coal-mine covenanted to get the whole of the mines "not deeper than or below the *level* of the bottom of the mine" at a particular point:—*Held*, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning, different from its ordinary signification of "horizontal line." *Clayton* v. *Gregson*, 159.

Quære, whether a previous agreement between the parties for a lease of the same mine, and for which the lease was substituted, was also admis-

sible in evidence for the same purpose. *Clayton* v. *Gregson*, 159.

The depositions are conclusive evidence in trover under 6 Geo. 4, c. 16, s. 92, in a case where the bankrupt might have sued if no bankruptcy had ensued, though the conversion be alleged to be after the bankruptcy. *Rex* v. *Wrangle*, 41.

The production of an entry of the minutes of a contract made by a third party, in the presence of, and by the direction of two contracting parties, but not signed by either of them, is not the only medium of proving the contract, unless there is evidence that the writing in fact constituted the agreement, and was taken to be so, and assented to as such by the parties; parol evidence of the terms of the contract is therefore admissible without accounting for the non-production of the written minutes. *Id.*

A bankrupt sold goods before his bankruptcy to the defendant for cash, but after they were delivered, the defendant refused to pay for them, and claimed to set off against the value, the amount of some running acceptances of the bankrupt then in his hands. The assignees, treating the purchase as a fraud, sued the defendant in trover, alleging the conversion to be after the bankruptcy. Notice to dispute the act of bankruptcy, and petitioning creditor's debt, having been given: —*Held*, that the depositions were conclusive evidence of these facts. *Kitchener and others* v. *Power*, 174.

Where issue is taken on a plea which would be bad on demurrer, because inconsistent with the admission of the party on the record, evidence in support of it cannot be rejected at *Nisi Prius*. *Bowman* v. *Rostrow*, 221.

In ejectment by the heir at law, the defendant set up a will of the ancestor, whereby he devised all his property to his wife, who afterwards married the defendant. One of the attesting witnesses stated that he had prepared this will, but that about a fortnight afterwards he had prepared a second will, which was executed and delivered by the testator to him, and which, upon the testator's death, he delivered to the defendant's wife. No notice to produce the second will was given:—*Held*, that the witness could not be asked in cross-examination, "whether at the time the testator signed the paper he made any declaration as to its being his last will and testament," or "whether he and any other persons had attested the paper in the presence of the testator." *Doe* d. *Phillips* v. *Morris*, 226.

If one party takes an interest in land under another, although that interest be wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest; therefore where a party under a fraudulent pretence borrowed the keys of a house from another, and then retained the possession:—*Held*, that he could not dispute the title of the lender in an ejectment, so as to maintain his own possession. *Doe* d *Johnson* v. *Baytup*, 270.

Where lands were let by auction, subject to conditions of sale, and a memorandum of the terms was signed by the auctioneer and the tenant, and underneath there was a signature of approval by the owner, and a direction to pay the rent into the hands of the auctioneer:—In an action of use and occupation brought by the auctioneer against the tenant, in which a verdict had been found for the plaintiff, the Court granted a new trial, upon the ground that the case had been left as an entire question of fact, without the attention of the jury having been called to the legal effect of the memorandum. *Evans* v. *Evans*, 239.

The question whether a fixture can be removed by a tenant without substantial injury to the premises, is a proper question for the jury, upon an issue whether the fixture is removable or not by law. The question whether removable by law or not, is a mixed question of law and fact. *Avery* v. *Cheslyn*, 283.

The Court will take judicial notice of the day of the week on which a certain day of the month was. *Hanson* v. *Shackelton*, 342.

A deed of assignment of a mortgage by demise, to which the original mortgagor, who was tenant in fee, and the mortgagee were parties, recited the mortgage deed:—*Held*, in ejectment by the executor of the assignee of the mortgage, that this recital afforded sufficient evidence of title without producing the mortgage deed. *Doe* d. *Rogers* v. *Brook*, 400.

Where an instrument under which both parties claim title is produced, under a notice to produce, it may be read against the party producing it without regular proof of its execution. *Doe* d. *Wilkins* v. *Wilkins*, 574.

The architect gave an order to the parties by whom he was employed to pay a particular sum out of his commission to a creditor:—*Held*, on the trial of an issue directed under the Interpleader Act, between the creditor and the architect, to try the right to the money, that a copy of an affidavit sworn by the architect in another action against the parties by whom he was employed, in which the order was set out, and which copy his attorney had admitted to be correct, was good secondary evidence for the plaintiff of the order which was lost:—*Held* also, that in the absence of any evidence to the contrary, the order must in such an issue be presumed to have been duly stamped. *Pooley* v. *Goodwin*, 567.

In an action for a libel contained in a song, which had been published by singing in the streets, a witness who had sung it was called, but the identical copy from which he had sung it could not be produced, notice to produce the original having been given, proof that a copy produced was similar to that which had been sung; that the manuscript had been delivered by *H.*, one of the defendants, to *M.*, the other, to print; that *M.* accordingly printed 1000 copies, and sent 300 of

them to *H.*; and that several were delivered by him to the witness, was held sufficient evidence from which a jury might infer a joint publication by both the defendants. *Johnson* v. *Hudson*, 680.

In an action by a surveyor for making some plans, which were inaccurate, but which had been given in evidence on the trial of a cause, *semble*, that the effect which they had on the jury in agreeing on their verdict is not evidence. *Armstrong* v. *Marshall*, 648.

A release by an individual member of a corporation to the corporation of all his interest in the subject-matter of the action, will not render the corporator an admissible witness in an action of trespass brought by the corporation for an injury done to the corporation land. *The Bailiffs of Godmanchester* v. *Phillips*, 686.

The statute 3 & 4 W. 4, c. 42, s. 26, which renders competent witnesses who are interested, by reason of the verdict or judgment being evidence for or against them, on an indorsement of their names being made upon the record, does not apply to such a case. *Id.*

Accounts of the receipts of the tolls of a fair and market, signed by a person deceased, calling himself the clerk of the steward, also deceased, are not admissible as *evidence of the title* of a claimant to the tolls, though found amongst the muniments of the claimant's ancestor. *Baron de Rützen and Wife* v. *Farr*. *The Same* v. *Lloyd*, 735.

In ejectment, to try the validity of a will, the question turned upon the sanity of the devisor, arising from general imbecility. Letters of various dates and upon various subjects, written to him by persons of respectability, since dead, in which he was addressed as a person of sound mind, found shortly after his death in his library with the seals broken, were tendered and received in evidence, without any proof of answers being returned or any other act done by the devisor in relation to them:—*Held*, on motion for a new trial, on the ground of the improper reception of evidence, that the letters were not admissible:—*Held* also, that if evidence had been given of any act done in relation to them by the devisor, the letters would have been admissible:—*Held* also, that as they were improperly received in evidence, the proper course was to grant a new trial without entering into an inquiry as to what might have been the extent of their effect, or whether, without them, there was sufficient evidence to sustain the verdict. *Doe* d. *Tatham* v. *Wright*, 729.

A deed having on it the seal of the *Bank of England*, and immediately round the seal the words "Sealed by order of the Governor and Directors of the Company of the *Bank of England*," and the signature "*James Knight*, Secretary," was produced in evidence. The seal was verified; but Mr. *Knight* was not called, nor his absence accounted for:—*Held*, that the above words were not to be considered as an attestation of the execution; and, therefore, that it was not necessary to call Mr. *Knight* as an attesting witness. *Doe* d. *The Bank of England* v. *Chambers*, 749.

EXCISE.—See SHERIFF.

EXECUTION.

See COSTS. PRACTICE. SHERIFF. WARRANT OF ATTORNEY.

Where judgment was entered up by consent, and a *written* agreement made to pay a certain sum, and refer the balance in dispute to arbitration, the Court will not allow the execution to be taken out for the balance, on affidavit of a different arrangement having been subsequently come to in *conversation*. *Butsey* v. *Day*, 114.

After time had been several times given to a sheriff to make a return to a writ of *fi. fa.* a rule was made, allowing him to withdraw from the execution, and to be at liberty to re-enter and relevy in case the invalidity of a commission of bankruptcy in a particular cause was established. The sheriff withdrew, and the cause came on for trial, but went off entirely on a point of law, and the commission was still contested before the Lord Chancellor. The goods had been in the interim again seized by another sheriff under another writ. The Court, however, made a rule on the first sheriff to return the first writ of *fi. fa.* *Wilton* v. *Chambers*, 116.

EXECUTOR.—See COSTS.

To make a man liable as executor *de son tort*, it is not essential that the dealing with the chattels of the deceased should be in the character of executor; therefore, where a party had received possession of goods from the widow of a deceased person, being aware at the time that they were the property of the deceased:—*Held*, that it was sufficiently an intermeddling to make him liable as an executor *de son tort*. *Sealley* v. *Powis*, 2.

A possession of goods which the defendant had received from the deceased in his life-time, under a colourable sale, may be sufficient to charge him as an executor *de son tort*. *Id.*

An executor or administrator may be liable, as the owner of the improved rent, for the expenses of pulling down and rebuilding a party-wall under the authority of the Building Act (14 Geo. 3, c. 78, s. 41,) even though he has no other assets than the improved rent. *Thacker* v. *Wilson*, 131.

The expenses of pulling down and rebuilding a party-wall are a charge upon the land in the hands of the owner of the improved rent. *Id.*

Where an administrator was sued upon the statute, and pleaded that he was only the owner in his character of administrator in right of his intestate, and after setting out an unsatisfied judgment against himself also *as* administrator, alleged that he had fully administered all the estate but

a sum which was not sufficient to satisfy the judgment:—*Held*, on demurrer, that the plea was no answer to the action. *Thacker* v. *Wilson*, 131.

On an issue taken on a plea of *plene administravit*, the amount of probate stamp is not any, even *primâ facie*, evidence of the amount of assets come to the hands of the executor. *Mann* v. *Lang*, 441.

It is, however, admissible evidence on the subject of assets, on the ground of its being a declaration made by the executor at the time of obtaining probate, of his expectations as to the amount of assets. *Id.*

FELONIES.—See SALE. SHERIFF.

FORCIBLE DETAINER.

In a conviction under 8 H. 6, c. 9, for a forcible detainer, it must appear on the face of the conviction that there was an unlawful entry. *Rex* v. *John Wilson*, 387.

A conviction for a forcible detainer on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion be stated. *Id.*

FOREIGN ATTACHMENT.

See CONVERSION.

FRAUDS, STATUTE OF.—See AGREEMENT.

GAME.—See CERTIORARI.

GUARANTIE.

Where the defendant addressed to the plaintiff the following letter, which he dated and signed, "I hereby agree to see you paid, within three months from the date hereof, the amount of 5*l.* due to you on account of Mr. *G. M.* jun.:—*Held* not sufficient to bind the defendant under the Statute of Frauds, the consideration for the promise not being sufficiently expressed. *Clancey* v. *Pigott*, 20.

The mother of an illegitimate child has no power to appoint a guardian for it under stat. 12 Car. 2, c. 24, s. 8. *Ex parte Glover*, 508.

Therefore the Court of K. B. will not, on *habeas corpus*, order an illegitimate child to be delivered up by a person to whose care it had been committed by the mother, into the custody of a person who was appointed guardian and devisee in trust for its benefit by the will of the mother. *Id.*

HABEAS CORPUS.—See WITNESS.

A *habeas corpus* will not lie to bring up a prisoner, in a county jail, for the purpose of voting at the election of a member of parliament. *Ex parte Jones*, 7.

On a rule for discharging a prisoner who was arrested under process from an inferior court, and brought up into this Court by *habeas corpus cum causâ*, it is no objection that the affidavits on which the rule is obtained are intituled in a cause in this Court. *Per Littledale*, J., and *Patteson*, J. *Perrin* v. *West*, 401.

Where a cause is removed by *habeas corpus* from an inferior court, the cause is not out of Court for want of declaration until after four terms from the time of bail put in. *Norrish* v. *Richards*, 437.

Proof that a plaintiff had not declared in an action removed by *habeas corpus* within two terms, is not sufficient evidence of a determination of the suit to support an action for malicious arrest. *Id.*

Quære, whether an action for a malicious arrest can be maintained when the cause has been removed from an inferior court by *habeas corpus*. *Id.*

The rule H. T. 2 W. 4, No. 35, applies to all Courts and to all causes, whether originally brought in a superior Court, either by serviceable or bailable process, or removed there by *habeas corpus*. *Id.*

Quære, whether in an action for a malicious arrest, the mode in which the original action is determined must be such as in itself shows a want of reasonable cause. *Id.*

The Court of K. B. will grant a rule absolute in the first instance for a *habeas corpus* to bring up the body of an infant, if it is probable that it may be concealed. *Ex parte Glover*, 508.

HIGHWAY.—See WAY.

Upon a question on the non-repair, by a parish, of a road in which there is an arch over a stream of running water, which is contended to be a county bridge, it is no objection on the ground of misdirection, that the judge at the trial expressed his opinion to the jury as a matter of fact, that it was a culvert only, and not a bridge: even though in expressing that opinion, he seemed to ground it upon the fact of there being no parapet walls. *Rex* v. *Whitney*, 147.

Nor is it any misdirection to state, as a strong fact, that the defendants suffered judgment by default in a former indictment; and that he thought such conduct on their part prevented them from taking the objection. *Id.*

The Highway Act, 13 Geo. 3, c. 76, ss. 30 & 45, directing the assessment for highway rate, enacts, that it shall be an equal assessment on the occupiers, not exceeding 9*d.* in the pound *on*

the yearly value of the lands, &c.—*Held*, that a cognizance alleging an assessment not exceeding 9*d.* in the pound upon all occupiers of lands, was not sufficient, without expressly alleging that it was an equal assessment *on the yearly value*. *Morrell* v. *Harvey*, 728.

HUSBAND AND WIFE.

See COPYHOLD. LIMITATION. STATUTE.

Where a wife had in one single instance bought goods which were delivered at the lodgings of her mother, without her husband's knowledge, but for which he subsequently paid:—*Held*, in an action for other goods also bought by the wife from the same tradesman, and delivered at the lodgings of the mother, but at a different place, that evidence of the facts was proper to be left to the jury, to show an agency in the wife, and a sanction of her dealings by her husband; and the jury having found for the plaintiff, the Court refused to disturb the verdict. *Filmer* v. *Lynn*, 59.

In an action by husband and wife for an assault on the wife brought without the husband's consent, the Court will stay proceedings until an indemnity for costs is given to the husband. *Harrison* v. *Almond*, 519.

INDICTMENT.

A prosecutor in an indictment for a nuisance, may be compelled to give a particular of the acts of nuisance intended to be relied on. *Rex* v. *Curwood*, 310.

INFANT.—See GUARDIAN.

INFERIOR COURT.—See MANDAMUS.

Where a defendant suffered judgment by default in the Palace Court:—*Held*, it was too late, after the jury were sworn on the writ of inquiry, to remove the cause by *habeas corpus*. *Smith* v. *Stocking*, 194.

Where a sheriff has set aside a judgment in the County Court:—*Held*, that whether he could do so or not, a *mandamus* could not be granted to compel him to issue execution on the judgment. *Eldridge* v. *Fletcher*, 199.

INSOLVENT.

See ATTORNEY. CONTRACT. LORDS' ACT. PLEADING.

The Court for the Relief of Insolvent Debtors has full power to imprison a man for a contempt of its authority, in not performing a condition to which he had consented by his counsel on making a rule absolute; and its jurisdiction being clear, this Court will not inquire upon affidavit into the circumstances under which it has been exercised. *In re Chapman*, 449.

An agreement was made to withdraw the opposition to a person's discharge under the Insolvent Debtors' Act on condition of his giving a bill for the debt, and his son guaranteeing the payment of it, and the opposition was withdrawn, and after the discharge the bill was given:—*Held*, that such bill was contrary to the policy of the Insolvent Debtors' Act, and the party having been arrested on it, the bail-bond was ordered to be delivered up to be cancelled. *Gould* v. *Williams*, 344.

Where a defendant agreed to pay a weekly sum, which was to be increased upon a contingency, and this was made a rule of Court:—*Held*, that a discharge under the Insolvent Debtors' Act did not extend to subsequent accruing payments; and that an attachment might issue for the non-payment. *Lawrance* v. *Walker*, 205.

It is not sufficient to serve a notice on the plaintiff's attorney when the plaintiff himself is dead, in order to entitle a defendant to his discharge under the Small Debtors' Act, but inquiry must be made for the personal representative also. *Ex parte Richer*, 518.

Service of a notice under the Lords' Act, on the landlady of a house where a creditor lodged, is not sufficient. *Wood* v. *Gompertz*, 524.

A warrant of attorney was given, subject to an agreement that judgment was not to be entered or execution issued until a certain time, unless in the meantime the defendant became bankrupt or insolvent:—*Held*, that the word "insolvent" could not be restrained to taking the benefit of the Insolvent Debtors' Act, but that the plaintiff might proceed on the warrant of attorney, on the defendant being in such a situation as to owe more than he had assets to pay with. *Biddlecombe* v. *Bond*, 612.

An insolvent having inserted in his schedule the consideration given for, and the amount of an annuity, but not some arrears due at the time of filing the schedule:—*Held*, that he could not afterwards be arrested for those arrears, there being no intention to mislead. *Jervis* v. *Jones*, 654.

Judgment having been recovered in a debt for 20*l.* debt and 1*s.* as merely nominal damages, the defendant is entitled to his discharge under the Small Debtors' Act. *Fogarty* v. *Smith*, 644.

INSURANCE.

A vessel was insured "at and from her port of loading in *North America*, to her port of discharge in *England*." She took in part of her cargo at *Cockaigne* in *New Brunswick*, and then sailed further up to *Bucktush*, a place within seven miles of *Cockaigne*, higher up in the same bay, and within the general jurisdiction of the

same custom-house at *St. John's*, but having a custom-house officer equally with *Cockaigne*, entitled to grant clearances. At *Bucktush* she took in a further part of her cargo, and returning to *Cockaigne* there completed her cargo:—*Held*, in an action for a loss which occurred after the vessel had sailed on her voyage, that the going to *Bucktush* after she had commenced taking in her cargo, was a deviation which vitiated the policy. *Brown* v. *Tuyleur*, 578.

The term "port of loading" means the place of loading only. *Id.*

By the rules of a mutual assurance association, by which both the assured and assurer were members, the policies were to commence on the day the ship was accepted, and to continue in force for twelve months from that time. The ship was accepted on 15th of *February*, 1829, and in *June* suffered an average loss. On the 21st of *October*, 1829, one of the committee, who had a power of attorney to execute policies on behalf of the members, signed a policy on the ship on the behalf of the assurer, the fact of the loss being at that time known to all parties:—*Held*, that the assured might recover on such a policy:—*Held*, secondly, that the fact of the loss having occurred before the policy was executed, was no revocation of the power of attorney:—*Held*, thirdly, that there was no objection to recovering, on the ground that the execution of the policy was in contravention of the 35 Geo. 3, c. 63, (Stamp Act applicable to policies). *Mead* v. *Davison*, 156.

In a policy by a member of a mutual insurance club, there was a memorandum amongst other exceptions, warranties, rules, terms, conditions, and agreements, that "all ships were to be inspected and approved by a committee of the club, and that all chain cables were to be properly tested:"—*Held*, in an action for a loss, that it was not a condition precedent which made it necessary for the insured to prove that a chain cable had been tested previously to the voyage. *Harrison* v. *Douglas*, 380.

Payment of money into Court, in an action on a policy, admits that the ship was seaworthy. *Id.*

Where, by the terms of a policy in a mutual insurance club, the amount of a loss is not to be drawn before a specified day, the defendant in an action on the policy, by paying money into Court, precludes himself from objecting that the action is brought too soon. *Id.*

Where an insured vessel strikes against another without either being in fault, and both suffer damage from the collision, and the amount of the gross damage is divided between them, and half of it paid by the captain of the insured vessel, in order to avoid detention in a foreign port, such payment cannot be recovered from the underwriters as a partial loss. *Devaux* v. *Salvador*, 751.

Where an insured vessel puts into port to be repaired, and the seamen belonging to the ship assist in such repairs, the amount of their wages and provisions during the repairs cannot be recovered from the underwriters; though, if they had not assisted, other persons must have been employed for that purpose. *Id.*

INTERPLEADER.

On an application by the sheriff, under 1 & 2 Will. 4, c. 58, s. 6, if the judgment creditor does not appear, the Court will order him to pay the costs of the application to the adverse claimant. *Tomlinson* v. *Done*, 123.

Where an execution was levied under a *fi. fa.*, and the sheriff delayed making a sale for more than two months, when a fiat of bankruptcy issued against the defendant:—*Held*, that the sheriff was not entitled to apply to the Court under the Interpleader Act. *Ridgway* v. *Fisher*, 189.

A delay by the sheriff of eight days in seeking relief under the Interpleader Act, is sufficient to disqualify him from applying to the Court. *Id.*

The sheriff is not disqualified from applying under the Interpleader Act, where a whole term has elapsed after a notice of claim under a fiat in bankruptcy, if the assignees were not chosen until after the term. *Barker* v. *Phipson*, 191.

The Court will not allow the sheriff the costs of applying to the Court under the Interpleader Act, but they will allow him extra expenses he may have been put to by obeying the rule of Court directing an issue. *Armitage* v. *Foster*, 208.

It is not necessary for the sheriff to apply to the different parties for an indemnity, before he applies to the Court under the Interpleader Act. *Crossly* v. *Ebers*, 216.

A claimant called upon by a rule under the Interpleader Act to come in and state his claim, must give the particulars upon his affidavit, to enable the Court to decide even whether he is to be made a party to an issue. *Powell* v. *Lock*, 281.

On the trial of an issue directed under the Interpleader Act to be in the form of an action for money had and received, evidence may be received which in an ordinary case would only strictly be admissible under a special count. *Hooley* v. *Goodwin*, 567.

The sheriff cannot support an interpleader rule on a claim made on goods seized under a *fi. fa.*, in respect of an interest as a partner, even though the claimant states that on the balance of accounts the partnership is indebted to him, and that, therefore, he alone is beneficially interested. *Holmes* v. *Mentze*, 606.

Where, in such a case, the execution creditor refused either to admit or deny the partnership,

the Court enlarged the time for returning the writ until the sheriff was indemnified. *Holmes* v. *Mentze*, 606.

The Court discharged a rule obtained by the sheriff under the Interpleader Act, it appearing that a son of the plaintiff, who was in partnership with his father as an attorney, was the under-sheriff. *Ostler* v. *Bower*, 653.

A claimant to some goods seized by a sheriff, not having appeared on a rule under the Interpleader Act, a rule for him to pay the plaintiff's costs is not absolute in the first instance. *Shuttleworth* v. *Clark*, 662.

A rule to take money out of Court, paid in to abide the event of an issue under the Interpleader Act, is only a rule nisi. *Stanley* v. *Perry*, 669.

JURISDICTION.—See BANKRUPT.

JUSTICES.—See ACTION. MASTER AND SERVANT.

On motion for a *mandamus* to justices to issue a warrant to distrain for a poor's rate, it must appear clearly to the Court that the warrant would be legal, and that the parties applying have no other remedy to enforce the rate. *Rex* v. *Hall and Dyer*, 83.

Where a highway rate was made, and there was no appeal against it, and on application to two magistrates, they refused to issue a distress warrant, though an offer to indemnify them was made, but not actually tendered; and it appeared there were reasonable doubts as to the validity of the rate, and as to whether the magistrates would not be liable to an action if they issued the warrant:—*Held*, that the Court would not grant a *mandamus* to compel them to do so. *Rex* v. *The Justices of Somersetshire*, 82.

Where a statute gives a magistrate summary jurisdiction over certain complaints, and authorizes him to fine and imprison a party convicted, he must, if more than one defendant be convicted, impose a separate fine on each, or otherwise the conviction will be bad, and trespass may be maintained against him. *Morgan* v. *Brown and another*, 717.

Where a local act of parliament declares that it shall be lawful for justices to issue their warrant to levy a rate imposed by certain commissioners under that act, upon a neglect or refusal to pay the rate, but does not contain any language directly making it compulsory on them to issue it; they may refuse to issue the warrant till the party has been summoned before them; and the Court will not compel them by *mandamus* to issue a warrant in the first instance without any summons. *Rex* v. *The Justices of Stafford*, 328.

Where in such an act the power of entertaining an appeal against a rate is in the commissioners appointed under the act, and not in the justices, the latter may still reasonably require the party to be summoned before them previously to their issuing their warrant. The provisions of such an act must be treated in that respect like those of the 43 Eliz. *Id.*

Where magistrates acting under the 50 Geo. 3, c. 49, examine overseers' accounts, declare a balance, and make an order for the payment of that balance, and then issue a warrant to levy the amount by distress, they cannot, merely on the ground of a doubt whether they have correctly ascertained the balance, withdraw the warrant, and so render the constable liable as a trespasser. *Barrons* v. *Luscombe*, 457.

LABOURERS.—See MASTER AND SERVANT.

LANDLORD AND TENANT.

See AGREEMENT. CONTRACT. EJECTMENT. MORTGAGE. USE AND OCCUPATION.

Where, during the existence of a lease containing a proviso for re-entry in case of assignment or under-letting without licence in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant, to take effect on the expiration of the old lease:—*Held*, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no licence in writing had been granted, as there was a waiver of the forfeiture, if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent. *Doe* d. *Weatherhead* v. *Curwood*, 140.

Quære, whether a mortgagee, by giving notice of the mortgage to a tenant, who comes into possession under a demise from a mortgagor after the mortgage executed, thereby makes him his tenant, unless something has been done to make a new tenancy between the tenant and the mortgagee. *Partington* v. *Woodcock*, 262.

The question whether a fixture can be removed by a tenant without substantial injury to the premises, is a proper question for the jury, upon an issue whether the fixture is removable or not by law. A plea to an action of trespass by a landlord against his tenant for removing a cornice, stated that it was the property of the defendant, that it was fixed up by him with screws only, for the purpose of ornament, that he carefully removed it during the term, doing no unnecessary damage, and that he repaired all the damage done. The replication stated, that it was affixed to the freehold of the house, and was not removable by law. Issue on that question:—*Held*, that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury; and that if they thought so, and that it had been so

removed, the tenant had a right to remove it. *Avery* v. *Cheslyn*, 283.

If one party takes an interest in land under another, although that interest be wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest; therefore where a party under a fraudulent pretence borrowed the keys of a house from another, and then retained possession:—*Held*, that he could not dispute the title of the lender in an ejectment, so as to maintain his own possession. *Doe* d. *Johnson* v. *Baytup*, 270.

A lease for years was granted to a married woman living apart from her husband, under the supposition that she was a *feme sole*:—*Held*, on a question whether there had been an adverse possession, that it was not a misdirection to put it as a question whether the possession had been adverse as against the wife, instead of as against the husband. *Doe* d. *Wilkins* v. *Wilkins*, 574.

Covenant by churchwardens and overseers, who are lessees for years of premises, to keep them in good and tenantable repair, and at the end of the term leave the same in such good and tenantable repair, together with all buildings erected upon the premises: a further covenant not to convert the premises to a particular specified purpose, but, on the contrary, keep the same for such purposes as they might think proper, provided the premises were left at the end of the term in the state and condition they were in at that time. After the expiration of the lease, succeeding parish officers held over, without any new agreement:—*Held*, that there was no implied promise to yield up the premises, at the expiration of the tenancy which existed after the determination of the lease, in the state in which they were when the original lease was granted. *Johnson* v. *Churchwardens and Overseers of St. Peter, Hereford*, 720.

LEGACY.—See EXECUTOR.

LIEN.

See ATTORNEY. PLEADING. SALE. SHIP.

LIFE DURATION.—See PRESUMPTION.

LIGHT.

The right to unobstructed access of light and air through a window does not extend to access through a substituted window in the same wall, varying in size, elevation, and position. *Blanchard* v. *Bridges*, 630.

Where the owner of adjoining land is a party to the deed, by which a house, with certain windows in it, together with a portion of the adjoining land, is conveyed, no licence or covenant not to obstruct the access of light and air as then enjoyed is to be inferred from that circumstance. *Id.*

Where the owner of adjoining land witnesses, without objection, alterations in the windows, there is no agreement on his part to be inferred at any time before the expiration of twenty years not to obstruct the access of light and air, by building up to the extremity of his land. *Id.*

LIMITATION.

See ANNUITY. MANDAMUS. TROVER.

The 3 & 4 W. 4, c. 27, s. 42, limiting the recovery of arrears of interest and rent to six years, does not apply to actions commenced before 24th *July*, 1833, when it was passed. *Paddon* v. *Bartlett*, 477.

LIQUIDATION.

A delivery of goods by a debtor to his creditor in liquidation of a previous debt, is a sufficient part payment to take the case out of the Statute of Limitations. *Hooper* v. *Stevens and Wife*, 480.

LUNATIC.

An order of removal of a lunatic to an asylum, made by two justices under the 9 Geo. 4, c. 40, stated that the justices "having made inquiry into the circumstances and place of last legal settlement of the said *H. B.* (the lunatic), we have adjudged that his said settlement is in the parish of *St. N.*:"—*Held*, that it was sufficiently in accordance with the form in the schedule to that statute; and not objectionable on the ground that it contained no present adjudication upon the place of settlement. *Rex* v. *St. Nicholas*, 141.

A subsequent order under the same statute, after reciting the former order of removal, directed the overseers of the parish where the settlement was to pay a weekly sum "for the maintenance, medicine, and care of the said *H. B.* (the lunatic) during so long time as the said *H. B.* hath been and shall be under the care of the keeper of the asylum:"—*Held*, that it was bad as to so much as was retrospective in its operation; but valid for the residue. *Id.*

MAINTENANCE.—See ATTORNEY.

MALICIOUS ARREST.—See HABEAS CORPUS.

MALICIOUS PROSECUTION.

See PLEADING.

MANDAMUS.

See CHURCHWARDEN. INFERIOR COURT. JUSTICE. POOR. WARRANT. WITNESS.

A *mandamus* will not lie to the Lords of the Privy Council, commanding them to receive a petition praying them to rehear a decision upon a case heard before and determined by them, upon an appeal from an Ecclesiastical Court to the judicial committee, instead of a Court of Delegates. *Ex parte William Carmichael Smyth*, 128.

Semble, that a *mandamus* will not go to an inferior court merely for the purpose of compelling the rehearing of a case already determined. *Id.*

Quære, whether a *mandamus* will go to justices to direct an order to the clerk of the peace to suffer rate-payers to take copies of assessments of county rates, and orders of sessions relative to county rates, and of all payments made thereout, and to the clerk of the peace to produce his accounts of the expenditure of the county rates, together with his vouchers for the same; the object of the application being to bring into question the legality of some of the payments. *Rex* v. *The Justices of Staffordshire*, 277.

A *mandamus* will not go, unless it is clear that there has been a direct refusal to do that which it is the object of the *mandamus* to enforce, either in terms or by circumstances which distinctly show an intention in the party to withhold from doing the act required; and where, upon being required to do a particular act, the party said that he was ready to do it upon being indemnified, which the applicant refused to do, but afterwards took no further steps by making a direct application or otherwise to obtain an unconditional refusal:—*Held*, that the refusal was not sufficient to warrant the Court in granting a *mandamus*. *Rex* v. *Brecknock and Abergavenny Canal Company*, 279.

A *mandamus* was granted commanding the lord of a manor to hold a court leet for the purpose of appointing a high constable of a hundred, though the day on which the court had been usually held for sixty years past had gone by, it not being distinctly sworn that the court was held on that particular day by prescription. *Rex* v. *The Lord of the Manor of Milverton*, 282.

A *mandamus* will be granted to hold a court, though above 200 years have elapsed since it was last held. *Rex* v. *The Corporation of Wells*, 666.

The Court will not grant a *mandamus* to admit an heir to a copyhold, where it appears his claim is long since barred by the Statute of Limitations. *Ex parte Phillips*, 660.

A *mandamus* will not go to inspect the accounts relating to county rates, on an application made to the Court of Quarter Sessions for the inspection, whilst the Court was in actual discussion upon the accounts. *Rex* v. *The Justices of Nottingham*, 318.

The 4 & 5 W. 4, c. 48, merely changed the place where the business of allowing the accounts was to be transacted, but took no power relating to them from the justices. *Id.*

A *mandamus* will not lie to a treasurer of a borough to compel him to pay costs to witnesses under the order of a judge, founded on the 7 Geo. 4, c. 64, the treasurer being a ministerial officer, and subject for his refusal to an indictment. *Rex* v. *Theophilus Jeyes*, 325.

Where a poor-rate was made for a parish, and the name of a party who occupied lands for which he was rated in another parish was inserted after the rate was made, the Court refused to grant a *mandamus* to magistrates to issue a summons and grant a distress warrant for non-payment of the rates, and the rule *nisi* was discharged with costs. *Rex* v. *The Justices of Cardiganshire*, 274.

At sessions the jury gave a special verdict, which was, in fact, a verdict of not guilty, and it was entered in the book of the clerk of the peace. Afterwards the chairman told the jury they must re-consider their verdict; and they gave a verdict of guilty generally, but recommended the defendant to mercy, on account of his not doing the act with a malicious intent: and the verdict was then altered in the book of the clerk of the peace. The Court refused to interfere by *mandamus* to cancel the alterations. *Rex* v. *Hughes*, 313.

The rule is absolute in the first instance for a *mandamus* to swear in a chapelwarden, where on the vacancy of a living there is a dispute between the curate and the sequestrator who should appoint, and each has appointed one. *Ex parte Penruddock*, 347.

Where a rule for a *mandamus* to execute the office of mayor was moved for so late in Trinity Term that the party had not time to answer the affidavits, the Court enlarged the rule until the following term, though the charter day for electing a new mayor would previously occur, until which time the public would be deprived of the services of the mayor, and though it was suggested that the party could have no answer to make to the rule. *In re the Mayor of Walsall*, 366.

A return to a *mandamus*, which recited that a party had been required to deliver up books, &c. in his custody, and commanded him to do so, that he had no such books, &c. in his custody on the day of the *teste* of the writ, nor since, nor at the time he was so required, was held sufficient, although it was objected that the return ought to have shown that he had them not during the intermediate time between the requisition and the *teste* of the writ. *Rex* v. *Round*, 546.

It would have been sufficient to return that he had them not on the *teste* of the writ or since. *Id.*

The Lords of the Treasury recommended a retired allowance to a public officer; and obtained a vote of parliament for a particular sum, which was received from time to time, under the Appropriation Act, by the proper officer. In several

letters written by their secretary these facts were stated, and directions given as to the mode of obtaining payment. The Lords of the Treasury refused to give an authority to him to pay it over to the individual to whom it was granted, unless upon conditions to which he would not agree:—*Held*, that he had a legal right to the amount so received, which the Court would enforce by *mandamus*. *Rex* v. *The Lords Commissioners of the Treasury*, 533.

The *mandamus* was directed to the Lords of the Treasury to issue the proper minute or authority to insure the payment. *Id.*

A party whose right to an office has been established by a verdict cannot have a peremptory *mandamus* to restore him to his office until he has signed judgment in the action. *Neale* v. *Bowles*, 584.

MASTER AND SERVANT.

See TROVER.

In order to found the jurisdiction of magistrates to order payment of wages under the 20 Geo. 2, c. 12; 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, it should distinctly appear on the information that the party complaining was a servant within the meaning of the statute; and that the relation of master and servant existed between him and the party complained against. Such facts appearing in evidence is not sufficient. *Wiles* v. *Cooper*, 560.

Magistrates have no right, under the 5 Geo. 4, c. 18, to imprison a master for non-payment of his servant's wages. That power is given only in cases of penalties and forfeitures. *Id.*

Where a yearly servant is dismissed by his master before the year is expired, for a cause which in law is sufficient to justify such dismissal, he cannot recover any wages, even *pro rata*, for such a period as has elapsed before his dismissal; and where a justifiable cause of dismissal exists, it is sufficient to prevent the recovering of wages, though the servant might not in fact have been dismissed upon that ground; and it is not necessary that the cause relied on in answer to an action for wages, should have been stated at the time of the dismissal. *Ridgway* v. *The Hungerford Market Company*, 244.

A clerk to a public company, who was hired at a yearly salary, having received on the 29th *March* a communication that it was the intention of the directors to make a new appointment to the situation of clerk, entered, on the 11th *April*, on the minutes, a protest to an entry of that communication, together with an order for calling a special court on the 17th *April*, for the purpose of appointing a fit person to be clerk. On the 17th *April*, the directors, by a resolution, declared the clerk to be displaced from his situation. It was put as a question to the jury, in an action for salary, whether the entry of the protest was a sufficient ground to justify the dismissal; and they found that it was. A verdict having been found for the plaintiff, the Court made absolute a rule for entering a nonsuit. *Ridgway* v. *The Hungerford Market Company*, 244.

An appointment of clerk to a public company, was by a resolution which stated the salary to be 200*l.* per annum, but said nothing as to the period of payment; the clerk acted as such and was paid several sums of 50*l.* each, at periods just after the usual quarter days of the year:—*Held*, that proof of these facts warranted a declaration in an action for salary, which alleged the contract to be at a salary of 200*l.* per annum, payable quarterly on the usual quarter days. *Id.*

Quere, whether a special action is not necessary to enable a yearly servant to recover wages, where the contract is put an end to before the year is expired. *Id.*

MESNE PROFITS.—See EJECTMENT.

MINE.—See POOR RATE.

MORTGAGE.

See EVIDENCE. LANDLORD AND TENANT. STAMP.

Query, whether a mortgagee, by giving notice of the mortgage to a tenant who comes into possession under a demise from a mortgagor after the mortgage executed, thereby makes him his tenant, unless something has been done to make a new tenancy between the tenant and the mortgagee. *Partington* v. *Woodcock*, 262.

If a lease be granted by a mortgagor prior to the mortgage, the mortgagee has the same rights against the lessee, and those claiming under him, that the mortgagor had, and no other than he had: and his remedy must be on the lease as assignee of the reversion, so long as the lease is in existence and the tenant acknowledges his title. If, however, the lease be subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrongdoers, and may bring ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them. If the tenant choose to pay the rent to the mortgagee, and he accepts it, a relation of landlord and tenant is created between the mortgagee and the tenant; and the remedy of the mortgagee will depend upon the particular circumstances of each case. *Rogers* v. *Humphreys*, 625.

No notice is necessary to be given by the mortgagee that he means to proceed against tenants when they have come in subsequently to the mortgage, because in such cases their title is wrongful as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary. *Id.*

By a deed of settlement a mortgage term of 1000 years was created, and lands settled to *E. R.* for life, subject thereto, with divers remainders over. The deed contained a power to *E. R.* to lease for ten years, or for seven years, to commence from her death. She demised under the power for seven years from her death, reserving the rent to the person who should be entitled for the time being to the freehold or inheritance:—*Held*, that the trustees of the term for 1000 years were the parties entitled to the reversion; and, consequently, that their assignee might distrain on the lessee:—*Held*, also, that the fact of the trustees having joined in the ejectment against the lessee, which was still pending, did not prevent such distress. *Rogers* v. *Humphreys*, 625.

NAVIGATION.

Indictment for a nuisance in a navigable river and port, by erecting a pier, which was an obstruction to the navigation. The jury found that the erection was a nuisance to the navigation, but that the inconvenience occasioned by it was more than counterbalanced by the advantages of it given to the public:—*Held*, that the indictment was maintainable, and the verdict must be entered for the Crown. *Rex* v. *Ward*, 703.

NEGLIGENCE.—See PRINCIPAL AND AGENT.

NEW TRIAL.

See AFFIDAVIT. DAMAGES. PRACTICE.

No new trial will be granted merely for the purpose of reducing the amount of damages in an action on a bill of exchange. *Seally* v. *Powis*, 2.

On the motion for a rule *nisi*, for a new trial of a cause tried before the sheriff or judge of an inferior court, under the 3 & 4 Will. 4, c. 42, s. 17; the Court require that the notes of the undersheriff or judge should be produced, together with an affidavit verifying them; or that it should be sworn that an application has been made for them, with a statement of the reasons why they are refused, so that the omission to produce them may be accounted for. *Hall* v. *Middleton*, 7.

If the judge give his reasons for granting the certificate, and those reasons are erroneous, it is no ground of interference. *Cann* v. *Facey*, 482.

In trespass for shooting a dog, the only witness called to prove the value, stated it to be 50*s*., and that was not contradicted; yet the jury found a verdict for 20*s*. The Court refused to interfere, either by increasing the damages, or by granting a new trial. *Id.*

If inadmissible evidence be received it is ground for a new trial; and the Court will not consider the question of its materiality or effect upon the minds of the jury. *Baron de Rützen and Wife* v. *Farr*; *Same* v. *Lloyd*, 735; *Doe* d. *Tatham* v. *Wright*, 729.

Where, in consequence of the affirmative of the issue being on the defendant, and his beginning, the jury made a mistake, and found a verdict for the defendant, when they intended to find for the plaintiff, the Court refused to grant a new trial. *Bridgewood* v. *Wynn*, 574.

After verdict for the defendant and a rule *nisi* for a new trial, the Court will not order the plaintiff to find security for costs, he being in insolvent circumstances and resident abroad. *Oxendon* v. *Cropper*, 642.

OUTLAWRY.

In proceeding to outlawry, since the Uniformity of Process Act, it is not necessary that the *capias* should issue into the county in which the defendant is described as resident. *Morris* v. *Davies*, 513.

OVERSEER.—See JUSTICES. POOR.

It is not the imperative duty of an overseer to endeavour to prevent the spread of small-pox amongst the poor, by furnishing the means of vaccination; the Court therefore refused an application for a criminal information against an overseer as for a breach of duty, in a case where he had in the first instance agreed to the vaccination, but afterwards refused to furnish the means of doing it. *Anonymous*, 315.

PARISH.—See PLEADING.

Evidence of payment of rent to parish officers in their character as such, is evidence to show that the property for which it is paid is parish property within the operation of the 59 Geo. 3, c. 12, s. 17, so as to enable the parish officers for the time being to maintain ejectment against a person holding under a lease granted by the parish officers previously to the statute. *Doe* d. *Higgs* v. *Terry*, 547.

A person holding under a lease granted by parish officers before the statute, is a tenant from year to year. *Id.*

PARLIAMENT.

A petitioner against the return of a member to the House of Commons did not appear at the time appointed for taking the petition into consideration, or within one hour afterwards. A select committee was, however, ballotted for and appointed; and having proceeded to adjudication, they declared that the petition was frivolous and vexatious:—*Held*, that the petition should have been discharged; and that the election of the committee was irregular: consequently the Court refused to allow judgment to be entered up on the Speaker's certificate of the costs of opposing the petition under 9 Geo. 4, c. 22.—*Bruyeres* v. *Halcomb*, 410.

Judgment cannot be entered up on a certificate granted on the report of a select committee which has not been appointed according to the provisions of the 9 Geo. 4, c. 22. *Bruyeres* v. *Halcomb*, 410.

The Court will inquire into the propriety of the appointment of a select committee when it is called upon to give effect to the Speaker's certificate, by allowing judgment to be entered up on it. *Id.*

PARTICULARS OF DEMAND.

Where a plaintiff had not complied with the rule of Court in giving credit in his particulars of demand for sums admitted to have been paid on account; the Court refused an application to deprive him of costs, after the case had been referred to arbitration, on the terms of the costs abiding the event; and an award had been made on the whole matter. *Smith* v. *Eldridge*, 527.

The rule which requires the sum or balance claimed to be stated in a particular of the demand, does not require the plaintiff to state the items in reduction of his demand: it is sufficient if he state the credit which he gives generally, so as to show the balance he claims. *Id.*

PARTNER.—See INTERPLEADER.

PATENT.

A patent granted to the patentee the exclusive privilege of making, using, exercising, and vending the invention, and prohibited other persons from making, using, or putting in practice the invention:—*Held*, that merely "exhibiting to sale" imitations of the invention was not any infringement of the patent; and a count in a declaration which only alleged an exposure to sale, was held bad on general demurrer. *Minter* v. *Williams*, 585.

PAVING RATE.

A *mandamus* will not lie to justices to enforce by distress warrants paving rates laid within the operation of the Metropolitan Street Act, 57 Geo. 3, c. 29; the 38th sect. of that Act giving a remedy by action, even though the rates are collected under prior local acts applicable to particular districts, by which the remedy by action is confined to cases where no sufficient distress can be made. *Rex* v. *Justices of Middlesex*, 462.

The 57 Geo. 3, c. 29, s. 38, applies to districts which were before regulated by local acts; and enlarges the power of recovering paving rates by action, where the local acts give only a right to recover by action where no sufficient distress can be made. *Id.*

PAYMENT INTO COURT.—See PLEADING.

PAYMENT.

See AGENT. GUARANTEE. PLEADING.

In assumpsit for money, the defendant pleaded payment and acceptance in accord and satisfaction. The plaintiff replied by merely assigning a different debt, to which the defendant pleaded *non assumpsit.*—*Held*, that the only issue was whether there were two debts or only one, which the plaintiff was bound to prove. *Hall* v. *Middleton*, 531.

When in such a case the plaintiff proved one debt only, and the defendant proved payment of a similar amount, but did not prove specifically that the payment was made on account of the debt proved; and the jury found for the plaintiff:—*Held*, that the effect of such evidence was merely to identify the debt proved by the plaintiff, with that admitted by him to have been paid; and therefore that the question on the record, whether there were two debts or only one, ought to have been submitted to the jury. *Id.*

PLEADING.

A declaration in an action *on the case* is a variance from a writ in an action *on promises*, and will be set aside with costs. *Scrivener* v. *Watling and Morley*, 8.

The expression "the whole action generally," in Reg. Gen. H. T. 4 W. 4, No. 9, means only the whole case contained in the count to which the plea is pleaded. *Bird* v. *Higginson*, 61.

Where to debt on simple contract in an inferior court, not of record, the defendant pleaded both the general issue and set-off; and the plaintiff, treating the latter plea as a nullity, replied only to the first, and obtained a verdict and judgment:—*Held*, on a writ of false judgment, that as the defendant could not plead double, and the first plea was complete in itself, the second was surplusage, and the plaintiff was justified in taking no notice of it: and the judgment was affirmed. *Chitty* v. *Dendy*, 169.

In trespass *quare clausum fregit*, where the plaintiff describes the close in his declaration by abuttals, and the defendant pleads only a justification that the close is his property as a customary tenement of a manor, but does not give any other description of the close, the plaintiff need not new assign, but is entitled to recover upon proving a trespass in a close in his possession answering the description given in the declaration, although the defendant may have a close in the same parish, which may also answer the description given in the declaration; and that description may be more accurately applicable to the defendant's close than to that of the plaintiff. *Lempriere* v. *Humphrey*, 170.

It is not accurate to describe a close as abutting "towards" a place. *Id.*

A plea allowed, though inconsistent with and

contradictory to two other pleas. *Wilkinson* v. *Small*, 214.

An allegation of a contract that work was to be completed *within* fourteen days before *Michaelmas-day*, is not supported by evidence of an agreement to complete the work fourteen days before *Michaelmas-day*. *Thomas* v. *Lambert*, 224.

Where lands were let by auction, subject to conditions of sale, and a memorandum of the terms was signed by the auctioneer and the tenant, and underneath there was a signature of approval by the owner, and a direction to pay the rent into the hands of the auctioneer: In an action of use and occupation brought by the auctioneer against the tenant, in which a verdict had been found for the plaintiff, the Court granted a new trial, upon the ground that the case had been left as an entire question of fact, without the attention of the jury having been called to the legal fact of the memorandum. *Evans* v. *Evans*, 239.

Semble, that in such a case the auctioneer could not maintain use and occupation. *Id.*

A sum of money was delivered by the plaintiff to the defendant to carry to a particular place, and there to pay to a certain person for the plaintiff. The defendant took the money, but in answer to the inquiries of the plaintiff on the subject, said that he had lost it:—*Held*, that assumpsit for money had and received was maintainable on proof of these facts merely; though it was objected that the proper form of action was a special action for the negligence. *Barry* v. *Roberts*, 242.

An appointment of clerk to a public company, was by a resolution which stated the salary to be 200*l.* per annum, but said nothing as to the period of payment; the clerk acted as such, and was paid several sums of 50*l.* each, at periods just after the usual quarter days of the year:—*Held*, that proof of these facts warranted a declaration in an action for salary, which alleged the contract to be at a salary of 200*l.* per annum, payable quarterly, on the usual quarter days. *Ridgway* v. *The Hungerford Market Company*, 244.

Quære, whether a special action is not necessary to enable a yearly servant to recover wages, where the contract is put an end to before the year is expired. *Id.*

A plea to an action of debt on a demise for rent, that long before the time of the demise made, the plaintiff had been discharged under an Insolvent Debtors' Act, and had been permitted by his assignee to remain in the possession and management of premises, and to make the demise in question; but that before any of the rent became due, the assignee gave a notice claiming to have the rent paid to him, whereby the defendant became liable to pay to the assignee, the reversion not being vested in the plaintiff, and his right having, by reason of the notice, become determined—was held bad on special demurrer. *Partington* v. *Woodcock*, 262.

A plea of defence to the said supposed cause of action in the declaration mentioned, if any such there be, is bad on special demurrer, because the qualifying hypothetical expression prevents it from being a confession. *Margetts* v. *Bayes*, 685.

A plea to an action on a bill of exchange, that after it became due the defendant paid the amount, and that the holder never sustained any damage by reason of the non-payment thereof, at maturity, concluding to the country, was held bad on special demurrer; and *semble*, that such a plea would not be good even if it concluded with a verification, unless it went on to allege that the payment was accepted in satisfaction. *Chapman* v. *Vandevelde*, 685.

It is no cause of demurrer to commence a declaration with the old statement, that the defendant is in the custody of the Marshal. Such a mode of declaring is the proper form when the action was commenced in an inferior court, and has been removed; because the Uniformity of Process Act, and Rules made on it, do not apply to such a case. If such a mode of declaring be adopted in an action which was not commenced in an inferior court, although the declaration would not be demurrable, it would be good ground for moving to set it aside for irregularity. *Dod* v. *Grant*, 711.

In an action by the second indorsee against the payee and indorser of a note, a plea "that the defendant never had any consideration for indorsing the note, and that the first indorser indorsed it to the plaintiff without any consideration, and that the plaintiff always held it without any consideration," is bad on demurrer. *Trinder* v. *Smedley*, 309.

A defendant in custody of the Marshal cannot be charged in execution by a plaintiff in another suit, by a side-bar rule to the Marshal to acknowledge him in custody. *Smith* v. *Sir E. B. Sandys, Bart.* 377.

A proceeding to charge a defendant in custody by a side-bar rule, where he is not in custody in the particular suit, is not merely irregular, but is wholly void and inoperative, and is not waived by lapse of time. *Id.*

A defendant so charged in execution is estopped from saying that he was not properly charged in execution by writ of *habeas corpus*, although the record of commitment alleged that he was brought up and charged in execution in the particular suit; and the form of the record is the same whether the defendant is charged in execution by *habeas corpus* or by side-bar rule. *Id.*

A plaintiff may declare *de bene esse* when a bail-bond has been taken, and special bail has not been put in within eight days after the arrest. *Hodson* v. *Mee*, 398.

The Court refused to allow a plea that the defendant had probable cause, together with a plea

of not guilty in an action for a malicious prosecution. *Cotton* v. *Brown*, 419.

In such an action the plea of not guilty puts in issue the want of probable cause. *Id.*

An instrument was made whereby the defendants promised to pay to the plaintiff or order a sum certain by instalments, but it was thereby declared "that it was thereby considered and fully intended by the receiver as well as the giver of that *note of hand*, that all installed payments thereupon whatsoever, from and immediately after the decease of the plaintiff, should cease and become null and void to all intents and purposes against the executors, &c. A declaration described the instrument as an agreement or instrument in writing:—*Held*, that a plea that the defendants did not make the said supposed promissory note in the declaration mentioned, was bad on special demurrer. *Worley* v. *Harrison*, 426.

Such an instrument is not a promissory note, being payable only on a contingency. *Id.*

Quære, whether a plea which is in effect only an answer to the first count of a declaration, is not bad on special demurrer, if it begin as an answer to the whole action. *Id.*

In an action of covenant, if the defendant pleads payment to the plaintiff on the record, who is only the nominal party to the suit, there being no fraud alleged, the Court will not take the plea off the file. *Gibson* v. *Winter*, 436.

A replication to a plea to trespass *de bonis asportatis*, justifying the removal of the chattels because they incumbered a close, as to a part of the goods *de injuriâ*, and as to other part extra force and violence, was held good on special demurrer. *Vivian* v. *Jenkins*, 468.

Such a replication may afford a several answer to different portions of the chattels. *Id.*

If one answer be insufficient on demurrer, it will not affect the validity of the others. *Id.*

A replication of *de injuriâ* to a plea setting out a title by demise, giving colour to the plaintiff, and justifying as a servant, in trespass *quare clausum fregit*, is bad. *Id.*

A replication of excess to a plea in trespass *de bonis asportatis*, justifying the removal of chattels, *damage feasant*, required, before the new rules H. T. 4 W. 4, a prayer of judgment; and the objection that there was no such conclusion might be taken on special demurrer. *Id.*

Declarations must be intituled on the face with the name of the Court. *Ripling* v. *Watts*, 525.

If a plea is a good plea when pleaded, but by the occurrence of subsequent matter becomes no answer to the action, the Court will not on that account direct it to be taken off the file; therefore, where to a *sci. fa.* to revive a judgment, the defendant pleaded the pendency of a writ of error, the Court refused to direct that plea to be taken off the file on the writ of error being quashed. *Snook* v. *Maddox*, 584.

Where a plaintiff relies upon a mercantile custom to support his claim for commission to a certain amount, the defendant may, without any special plea, produce evidence to show that under certain circumstances the custom is to pay but half that amount; the evidence being offered to show that the contingent reduction was part of the original contract, and not that it was a subsequent alteration so as to create a new contract. *Broad* v. *M'Aylmer*, 532.

Nothing can be pleaded to a *scire facias* on a judgment, which might have been pleaded to the original action. *Baylis* v. *Hayward*, 609.

In a proceeding by *scire facias* on a judgment, a plea of bankruptcy of the plaintiff must show distinctly that the bankruptcy happened at such a time that the defendant had no opportunity of pleading the fact to the original action. *Id.*

A plea which left it uncertain whether the bankruptcy happened subsequently to the judgment, was held bad on special demurrer. *Id.*

Indebitatus assumpsit for work and labour, money paid, and on an account stated. Plea, as to 20*l.*, parcel of the monies in the first two counts mentioned, and as to 20*l.*, parcel of the money in the last count mentioned, that the said two sums were the same debt, and then payment in satisfaction of the 20*l.*:—*Held*, on special demurrer, that this plea was bad, for not stating how much of the 20*l.* due on the account stated was applicable to the count for work and labour, and how much to the count for money paid:—*Held*, also, that it was unobjectionable on account of the averment of identity, as that averment merely amounted to an allegation that the sum due on the account stated was due on the same cause of action as the sums mentioned in the first two counts, which is allowable by the new rules. *Mee* v. *Tomlinson*, 614.

A plea of set-off of a smaller sum than that to which the plea is applied, is bad. *Id.*

A plaintiff may still reply *nil debet* to a set-off, notwithstanding the rules H. T. 4 W. 4, II. 2, 3. *Brown* v. *Daubeney*, 646.

If he replies never indebted, he cannot give payment in evidence. *Id.*

The Court allowed the defendant to add a special plea, stating that a certain contract was not in writing, it being uncertain whether that could be given in evidence under the general issue. *Smith* v. *Dixon*, 668.

Declaration on a bill of exchange, describing it as drawn by one *J. S.* on *J. W.*, indorsed by *the said J. S.* to the defendant, by the defendant to the said *J. S.*, and by the said *J. S.* to the plaintiff. Plea: that the plaintiff, without the knowledge of the defendant, took from the said *J. S.* a cognovit in an action brought by the plaintiff against the said *J. S.*, and so gave him time, whereby

defendant was discharged. *Held*, that the plaintiff must be considered, from the statement in his own declaration, to have known that *J. S.* who drew the bill was the same person with *J. S.* who indorsed it to him, and that his taking a cognovit from such a person was a discharge of the defendant, who was in fact a subsequent party to the bill. The omission in the plea to state that the cognovit was given before action brought, or to state when it was given, so as to show whether the plea ought to have been in bar of the action generally, or only in bar of the further maintenance of the action, is only ground for special demurrer. *Hall* v. *Cole*, 722.

PLENE ADMINISTRAVIT.—See EXECUTOR.

POOR.—See APPRENTICE. LUNATICS.

A pauper agreed to work for a master for a twelvemonth at 4*s.* a week, to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off the middle of the day on Saturday, so as to make up the ten hours a day. About a month after entering into the service, it was agreed that the pauper should receive one penny per hour for over-hours. The pauper worked over-hours at his master's request; and sometimes on Sundays, for which he was paid; and he kept an account of his over-time by the direction of his master:—*Held*, that this was an exceptive hiring, which would not confer a settlement. *Rex* v. *Norton Bavant*, 149.

The nature of the tenure of an office to confer a settlement must be annual. The office of assistant petty constable, under the *Cheshire* Constabulary Act (10 Geo. 4, c. 97,) is not an annual office, therefore a general appointment to that office is not sufficient to give a settlement, though the pauper served the office for upwards of fifteen months. *Rex* v. *Middlewich*, 152.

Semble, that if the appointment had been specifically for a year, it would have been sufficient. *Id.*

The parish of *F.* and the town of *F.* were coextensive, and more extensive than the manor of *F. B.* which was within them, as well as four other manors; but there was no paramount manor. There were two pounds in the parish, one in the manor of *F. B.* and the other in one of the other manors. The pauper residing under a certificate in the parish of *F.* was appointed to the office of pinder for the town of *F.* by the homage at a court baron of the manor of *F. B.*, and was duly sworn to execute the office, which he did for two years:—*Held*, that he was not legally placed in the office so as to acquire a settlement by serving an office. *Rex* v. *St. Mary, Newmarket*, 154.

Quære, whether the office of pinder of a manor be a public annual office sufficient to confer a settlement? *Id.*

It is not by the 4 & 5 W. 4, c. 76, s. 79, compulsory on an appellant parish against an order of removal, to give notice of appeal within twenty-one days after notice of the order of removal being made. *Rex* v. *The Justices of Suffolk*, 618.

It is to be presumed that notice has been given to the overseers of the parish in which a parish apprentice is bound, according to 56 G. 3, c. 139, s. 2, before the allowance is made by the justices; and it is not necessary for a party who relies upon the indenture at the sessions to prove that such notice has been given. *Rex* v. *The Inhabitants of Whiston*, 696.

Such notice is necessary. *Id.*

An occupation of a house by a person who was in the habit of taking in labouring people to sleep in some of the rooms, sometimes letting a bed, sometimes half a bed, the letting being generally by the night, but sometimes by the week, is, notwithstanding, an actual occupation within the 1 W. 4, c. 18. *Rex* v. *St. Giles's in the Fields*, 693.

The consideration expressed in an indenture of apprenticeship was 10*l.* paid to the master by a public charity, the trustees of which were parties. The apprentice's grandfather, however, agreed, without the knowledge of the trustees, to pay, and did pay to the master, after the execution of the indenture, 15*l.* more:—*Held*, that the indenture was void by 8 Anne, c. 9, s. 39, for not having inserted in it the full sum contracted for with, or in relation to, the apprentice. *Rex* v. *Amersham*, 194.

By the regulations of a prison, the appointment of the turnkeys and assistants employed was vested in the keeper, subject to the confirmation and approbation of the visiting justices. The salary was annual, and paid by the treasurer of the county, but in all other respects the turnkeys were under the immediate orders of the keeper, who had the power of suspension, but could not make a new appointment until an inquiry had been instituted by the visiting justices:—*Held*, that no settlement by hiring and service was gained by a turnkey so appointed. *Rex* v. *Sparsholt*, 692.

A pauper hired a tenement for a year: upon the expiration of a year he assigned all his stock, crops, implements, and personal property to a trustee, for the benefit of his creditors. The trustee paid the year's rent out of the proceeds of the sale of that property; and the pauper continued to occupy the house only for the whole year:—*Held*, that as the assignment of the crops gave a right of entry on the lands, there was no sufficient occupation by the pauper to gain a settlement:—*Held* also, that the payment of the rent by the trustee out of the proceeds of the sale was not a sufficient payment of the rent by the pauper, as

the person hiring the tenement. *Rex* v. *Pakefield*, 697.

A boy was apprenticed by the trustees of a charitable fund, and a premium of 15*l.* paid out of that fund. Before the expiration of the term, the master, at the request of the apprentice, verbally and without the knowledge of the trustees, consented to his serving the remainder of his term with another person; and agreed to give that person "6*l.* as part of the 15*l.* paid as a premium on the binding:"—*Held*, that the 6*l.* was a valuable consideration paid to the second master, "other than what was given by any public charity," and therefore that the transfer was void for want of a stamped assignment. *Rex* v. *Fakenham*, 222.

To do away with a birth settlement by proof of the mother's settlement, it is not necessary to show previously that the father's settlement cannot be found. *Rex* v. *St. Mary, Leicester*, 330.

A case established by *primâ facie* evidence, may be answered by another *primâ facie* case of a stronger character. *Id.*

The daughter of Irish parents born in *England*, of the age of 18, who had acquired no settlement, became chargeable, and applied for relief:—*Held*, that she could not be removed to the parish where she was born; for that relief to her was relief to her father, which made the whole family removable to *Ireland*, under 3 & 4 W. 4, c. 40. *Rex* v. *Mile End Old Town*, 551.

The 3 & 4 W. 4, c. 40, is not repealed or altered by the 4 & 5 W. 4, c. 76, so that the law as respects relief given to the children of Scotch or Irish parents, as regulated by the former statute, is not altered by the latter. *Id.*

A pauper was committed to gaol on a charge of bastardy for want of sureties. The father of the girl became his surety, and he was let out, and returned immediately from the gaol to *W.* On coming to *W.* the father took lodgings for him at *W.* The pauper having resided about a week in the lodgings married the girl, and continued to reside in the same lodgings until he was removed from *W.* The sessions quashed the order, on the ground that the pauper had not come to inhabit in *W.* within the meaning of the statute 13 & 14 Car. 2:—*Held*, on a case stating the above facts, that the finding that the pauper did not come to inhabit was not conclusive to prevent the Court from considering the question whether or not the facts stated showed a coming to settle within the statute:—*Held*, also, that there was a coming to settle within the meaning of the statute. *Per Patteson*, J. and *Williams*, J.; *Coleridge*, J., *dissentiente*. *Rex* v. *Woolpit*, 483.

A pauper's mother applied to a carpet-weaver to take the pauper into his employment. The master agreed with her to take him for two years on trial, after which, if the pauper and master agreed, the pauper was to be apprenticed. He was to be found in board, lodging, and washing by the master, but was to have no wages, except what the master pleased to give him as pocket-money. He was to draw. At the sessions, it was stated by a magistrate, and assented to, that every carpet-weaver is taught the art of drawing as a draw boy: the chairman left it to the opinion of the Court whether the contract was an imperfect contract of apprenticeship, or of hiring and service, and the Court found that it was an imperfect contract of apprenticeship:—*Held*, on a case stating the above facts, that the sessions were right. *Rex* v. *Great Wishford*, 489.

Since 1 W. 4, c. 18, there must be an actual occupation of the whole tenement by the party hiring it, in order to confer a settlement by renting a tenement: where a pauper took a messuage consisting of two tenements, at a rent of 60*l.* payable half-yearly, and during the year's occupation underlet three rooms to a person who had the exclusive occupation of them for three weeks, for which he paid 8*l.*, and a front shop to another person, who had the exclusive occupation of it for a week, it was held that the pauper did not gain a settlement. *Rex* v. *St. Nicholas, Colchester*, 47.

Quære, whether a payment of rent by means of a distress on the goods of the party hiring the tenement, is sufficient to satisfy the 1 W. 4, c. 18. *Id.*

Where a man having a leasehold interest, died intestate, leaving the pauper and three other sons; and one of the sons having taken out letters of administration, the four brothers joined in mortgaging the estate; and afterwards the pauper, by verbal agreement only, parted with his interest in the equity of redemption to one of his brothers for a consideration paid, and subsequently joined with his other brothers in an assignment to him:—*Held*, that the pauper parted with his interest in the equity of redemption by the verbal agreement; and therefore could gain no settlement by estate by virtue of a residence in the parish where the estate was, after the verbal agreement, but before the assignment. *Rex* v. *Cregrina*, 53.

Where a pauper was bound apprentice to *J. M.* and *W. M.*, two partners in *Exeter*, who afterwards dissolved partnership, and *W. M.* never afterwards interfered with the pauper, who continued with *J. M.* and a new partner in the business at *Exeter*, but resided at *Tiverton*, where they also carried on business; immediately after the death of *J. M.* the pauper returned to *Exeter*, and continued in the business there, until he afterwards entered into an arrangement with the new partner:—*Held*, that the service in *Exeter*, after the death of *J. M.*, was not a service with the consent of *W. M.*, the surviving partner under the indenture, so as to confer a settlement in *Exeter*. *Rex* v. *St. Martin, Exeter*, 69.

A residence under an order of suspension cannot be taken into the account in the computation

of the period of occupation, in order to gain a settlement by renting a tenement. *Rex* v. *St. John at Hackney*, 39.

An effective member of a volunteer corps inrolled under the 44 Geo. 3, c. 54, was not *sui juris* so as to be competent to make a valid contract of hiring, to give him a settlement by hiring and service. *Rex* v. *Witnesham*, 43.

POOR RATE.

By a clause in a canal act tolls were not to be rated, and the company were to be rated from time to time for and in respect of the lands taken, and the warehouses and other buildings to be erected by the company, "in the same proportion as, but not at any higher value or improved rent, than other lands, grounds, and buildings, lying near or adjacent thereto, are or shall for the time being be rated, and as the lands, warehouses, and other buildings so taken and erected would have been ratable in case the same had been continued in their former state, and not been used for the purposes of the said navigation:"—*Held*, 1st, that the proper mode of laying a poor's rate on the company was according to the fluctuating value of adjacent lands and buildings, and not according to their value at the time of the formation of the canal; and 2dly, that the increased value is to be taken for the time being from whatever source it may arise, and not that the increase arising from the canal itself is to be omitted. *Rex* v. *Monmouthshire Canal Navigation Company*, 464.

The proprietors of a river navigation formed under an act of parliament, are ratable to the relief of the poor in every parish through which it passes, in proportion to the profits derived from the navigation in such parish. *Rex* v. *Woking*, 539.

The proprietors of a river navigation running through several parishes were entitled to claim a toll of 4*s*. The trustees fixed the tolls at 4*s*. for the whole distance, and at different decreased rates for fixed portions only of the whole distance:—*Held*, that in calculating the sum at which the proprietors were to be rated in any one parish, the proportion was to be ascertained on a mileage calculation with respect to the whole distance as regards the thorough trade; and on a mileage calculation with respect to the distance gone over as regards the short trade, excluding in the latter case all trade in parts in which the particular parish was not situated. *Id.*

In calculating the amount of profit, a deduction for the necessary repairs and expenses must be made, the proportion of the particular parish being ascertained where the repairs are equal throughout the whole distance, by a mileage calculation. *Id.*

So a reasonable sum must be deducted for tenants' profits. In this case 10*l. per cent.* was allowed, that being found by the case to be a reasonable sum. *Id.*

No deduction is to be made in respect of sums payable by the act of parliament as compensation to persons injured by the navigation, out of the profits of the undertaking; such sums being only in the nature of rent charges, and not affecting the value of the occupation. *Id.*

A parish consisted of several townships: some in one county, which always maintained their own poor apart from each other and from the rest of the parish: others, in another county, which formerly maintained their poor jointly, and so continued till 1832, when one of them obtained a *mandamus* to appoint separate overseers of the township. In 1816, an order was made on the parish at large, describing it as "the parish of *H. O.*, in the county of *S.*" (the county last referred to) and was unappealed against:—*Held*, on an appeal against an order of removal in 1834, from a third parish to the separated township, that the latter was not estopped from giving evidence to show that the pauper was not settled in that particular township. *Dubitante*, *Patteson*, J. *Rex* v. *Oldbury*, 554.

By an act of 6 Geo. 2, forming a company of proprietors of a river navigation, it was declared that they were not to be taxed or assessed for the same, or the profits thereof, at any place except *S.* or *D.* By another act, 2 Geo. 4, new cuts or canals, alterations and works were made; and it was declared "that all and every the provisoes, directions, restrictions, penalties, and forfeitures in the former act, respecting the boatmen, the owners, commanders, masters, or rulers of boats, keels, or vessels, or other persons employed thereon, or passing the locks, or making obstructions thereon, or in any other respect relating thereto, or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said new cuts or canals, alterations and works, as fully in every respect as if the said cuts, &c. had originally been part of the said river navigation, and had been inserted in the said several and respective acts:"—*Held*, upon both acts taken together, that lands taken for cuts under the latter act, were part of the river navigation, and not liable to be rated to poor rates elsewhere than in *S.* or *D.* *Rex* v. *Barnby Dun*, 89.

Where, on a question as to the rateability of freestone works, the sessions in a case called it a quarry, but stated all the facts respecting the mode of working, for the opinion of the Court, without determining the question whether it was a mine or not, the Court sent the case back to be reheard at the sessions, saying that the question of mine, or no mine, is a question of fact, which the sessions ought to determine. *Rex* v. *Dunsford*, 93.

The method of working, and not the nature of the substance obtained, is the criterion to determine the question of mine or no mine, so as to be exempt from poor rates. *Rex* v. *Dunsford*, 93.

Where a coal mine extends under two parishes, but all the coals are raised in one, where the only shaft is, the occupier is liable to be rated in each parish, and not exclusively in that parish in which the coals are raised. *Rex* v. *Foleshill*, 71.

Semble, that a defect in the enumeration of some of the property in a poor rate, is no ground for refusing a *mandamus* to justices to issue a distress warrant. *Rex* v. *Wilson*, 407.

Such a defect is ground of appeal. *Id.*

Quære, whether a confirmation by the sessions of overseers' accounts which have been objected to on the ground that the overseers have omitted to collect any assessment from a party who it is alleged is liable to be rated, is any answer to an application for a *mandamus* to justices to enforce a rate on that party. *Id.*

Where after a rule *nisi* for a *mandamus* to justices to issue a distress warrant for a poor rate had been obtained, a tender of the amount was made by a third party to the overseers and refused:—*Held*, that it was no ground for discharging the rule. *Id.*

On the application of a summons for non-payment of a poor rate, the overseer engaged before the justices to procure evidence of a beneficial occupation. On the hearing he failed to do so; and the justices deciding against the validity of the rate on that ground, refused to issue a distress warrant:—*Held*, that without a further application, after stating that the occupation need not be beneficial, a *mandamus* could not be granted. *Id.*

Semble, that an occupier of land within a parish, to whom, on behalf of himself and the other tithe payers of the parish, a lease of the tithes of the whole parish is granted by the vicar at an annual rent, the amount of which is apportioned, is liable to poor rate in respect of the tithes, though he personally has no beneficial occupation. *Id.*

Where a poor-rate was made for a parish, and the name of a party who occupied lands for which he was rated in another parish was inserted after the rate was made, the Court refused to grant a *mandamus* to magistrates to issue a summons and grant a distress warrant for non-payment of the rates. *Rex* v. *The Justices of Cardiganshire*, 275.

In moving for a *mandamus* to an overseer to deliver up books, &c. belonging to the parish, on account of his having been convicted under 4 & 5 Will. 4, c. 76, s. 97, a copy of the conviction ought to be annexed to the affidavits on which the rule is moved. *Rex* v. *Simms*, 514.

In debt, on the 17 Geo. 2, c. 3, s. 2, against an overseer, for refusing to allow inspection of the rate; it is sufficient to allege in the declaration, that the plaintiff is an inhabitant of the parish, without going on to say that he is a rated inhabitant. *Batcheldor* v. *Hodges*, 725.

That statute applies to assistant overseers, who have the custody of the rates, as well as to overseers, the words of the second section being referable to the words of the first, where the expressions used are, "churchwardens, overseers, or other persons authorized to take care of the poor." *Id.*

The statute applies to old as well as modern rates, and to those against which the time for appealing has elapsed, as well as subsisting rates. *Id.*

POWER.

A power was given to appoint, by "last will and testament in writing, or any writing purporting to be, or in the nature of a last will and testament, or by any codicil or codicils thereto, to be by the appointor signed, sealed, and published in the presence of and attested by three or more credible witnesses." A will was made. At the commencement was a declaration by the testatrix that she did publish and declare it to be her last will and testament. At the end, after a similar declaration, it proceeded, "in witness whereof, I have set my hand and seal." Then followed her name and seal, and after the word "witness," the names of three witnesses:—*Held*, that the will was a good execution of the power, though it was objected that the attestation ought in terms to have expressed that the will was executed in the presence of the witnesses. *Doe* d. *Spilsbury* v. *Burdett*, 591.

PRACTICE.

In a case tried before the sheriff, the Court refused to allow a motion for a new trial after the fourth day of the term, though the sheriff's notes had not been received until the fifth day, when the motion was made. *Anonymous*, 146.

The Court will not grant a *distringas* merely because the defendant is resident in Ireland. *Evans* v. *Fry*, 185.

Where a rule was enlarged to a subsequent term, on the usual terms of filing the affidavits a week before the term, the Court refused to hear affidavits filed afterwards. *Turner* v. *Unwin*, 186.

Where a defendant does not enter an appearance, and the plaintiff omits to do it for him, it is a nullity; which is not waived either by delay in making an application to set aside the proceedings, or by the defendant taking a step in the cause. *Robarts* v. *Spurr*, 201.

Where a defendant pleaded by an attorney who was in partnership, and the partnership was afterwards dissolved; and the other partner took a step in the cause, which the plaintiff's attorney recognized; the Court refused to set aside the

proceedings for want of an order to change the attorney. *Farley* v. *Hebbs*, 203.

The rule of court, E. T. 41 Geo. 3, as to filing and entering of record the *committitur* on a judgment, only applies to persons already in custody at the suit of other persons. *Deemer* v. *Brooker*, 206.

Where an arrest was on the 29th of *January*, and on the 10th of *March* the defendant made application to be discharged out of custody, on account of irregularity in the *capias*:—*Held*, it was not made within a reasonable time, as required by the rule of Court, 33 H. T. 2 Will. 4. *Foote* v. *Dick*, 207.

It is a good excuse for not proceeding to trial according to a peremptory undertaking, that owing to the press of business in the Court, another cause which was in the new trial paper, and would have decided the dispute, had not yet been argued, and which it was expected it would have been when the undertaken was given. *Baron de Rützen* v. *Richards*, 210.

Where a defendant was under terms of rejoining *gratis*, and the plaintiff signed judgment for want of a rejoinder, when he might have himself added a *similiter*, the Court set aside the judgment, but without costs. *Seaton* v. *Seale*, 210.

On discharging a rule for judgment as in case of a nonsuit, where the plaintiff had become insolvent, and made an assignment of his property to trustees; the Court required not only a good peremptory undertaking, but also that security should be found for the costs. *Nicholson* v. *Milne*, 211.

Where a verdict was taken on all the counts by consent, with liberty to move to enter a nonsuit; the Court refused, after that motion had been discharged, to allow the defendant to confine the verdict to any particular counts. *Martin* v. *Coleman*, 86.

The Court allowed a fresh affidavit to be filed in support of a rule *nisi* to set aside an award the day after the rule was obtained. *Perrin* v. *Kymer*, 20.

The practice of requiring that a party obtaining a rule *nisi* is bound to take office copies of the affidavits of the other party, on showing cause, is not adhered to. *Pitt* v. *Combs*, 13.

A party may make a second application to the Court on the same subject, though he has not paid the costs of a former rule *nisi*, which had been discharged. *Wilton* v. *Chambers*, 116.

The Master, upon reference to him, may receive affidavits, but cannot, except by special directions in the rule, receive *viva voce* testimony. *Noy* v. *Reynolds*, 14.

The Court refused to allow affidavits to be used on showing cause against a rule for a new trial, where the rule had been moved on the report alone without any affidavits. *Doe* d. *Johnson* v. *Baytup*, 270.

In an action commenced by writ, since the Uniformity of Process Act, against two defendants, a verdict was found for the defendants. Judgment was entered up for the *defendant* in the singular number, and that the plaintiff should take nothing by his *bill*, and the word "counts" was used instead of "issues." The Court allowed an amendment of these mistakes on payment of costs, after the term in which judgment was signed, and although there was a writ of error pending, upon which there was an assignment of other substantial errors. *Paddon* v. *Bartlett*, 286.

Where a motion is made after plea to change the venue, it is the duty of the defendant to state distinctly in his affidavit what witnesses reside in the county into which he seeks to change the venue. *Higgins* v. *Houseman*, 218.

Where the plaintiff knew the application would be made, leave was granted to change the venue after issue joined, though the witnesses might already be on their way to attend the trial. *Jones* v. *Gee*, 183.

Quære, whether an application to change the venue in a special jury case, can be granted after the jury are struck. *Rex* v. *Tarpeley*, 58.

In ejectment, to try the validity of a will on the ground of insanity, the Court refused to enter a suggestion on the roll, under 3 & 4 Will. 4, c. 42, s. 22, to change the venue from Somersetshire to London, on the ground that the testator resided in London at the time of his death, and that the evidence of an eminent medical man living in London was essential, when it appeared that the testator was most visited and best known at his country estate in Somersetshire, where the will was made, and in which county there were also many witnesses. *Doe* d. *Baker* v. *Harmer*, 80.

A motion to change the venue cannot be made after plea, but the defendant must wait until issue is joined. *Youde* v. *Youde*, 338.

An attachment was granted for non-payment of costs, in pursuance of the master's *allocatur*, where the service was regular, except that the party refused to take the copy of the rule and *allocatur*, which was then put under the house door. *Rose* v. *Koops*, 213.

An attachment against an attorney for non-payment of costs in pursuance of the master's *allocatur*, will not be granted, unless there has been an absolute personal service. *Albin* v. *Toomer*, 215.

Where a defendant, on being served with a writ of summons, took forcible possession of it after a refusal to see it, and then returned it to the person who served him—*Held*, it was no ground for an attachment. *Weeks* v. *Whiteley*, 218.

Where a person behaved in so violent a way as to prevent a formal service of a rule and *allocatur* for payment of costs, he being aware of the intention to do so:—*Held*, sufficient service to warrant an attachment. *Wenham* v. *Downs*, 216.

An affidavit by the defendant, on taking money out of Court which had been deposited in lieu of bail, stating that bail had been put in, but not stating " in due time :"—*Held* sufficient. *Young* v. *Maltby*, 214.

A plaintiff cannot be nonsuited but by his own consent; and where at a trial leave was given to move to enter a nonsuit, and the trial proceeded, and the jury after a long consideration disagreed upon their verdict:— *Held*, that the judge could not in the absence of the plaintiff and his counsel direct a nonsuit. *Dewar* v. *Purday*, 227.

Where a jury cannot agree in their verdict, they may be discharged, if circumstances render it improper that they should continue to deliberate; but the judge cannot nonsuit the plaintiff without his assent. *Id.*

A notice for trial on a day that was *Easter Tuesday*, held good. *Charnock* v. *Smith*, 217.

The Court will not delay the trial of an action until after the trial of an indictment for perjury in a matter relating to the cause. *Johnson* v. *Wardle*, 219.

A trial at bar will be granted on the *ex officio* application of the Attorney-General, where the interest of the King as Duke of *Lancaster* may come into question. *Brown* v. *Lord Granville*, 270.

A writ of summons dated on *Sunday* is wholly void. *Hanson* v. *Shackelton*, 342.

A writ directed to the coroner need not show upon the face of it the reason why it is so directed. *Baxter* v. *Gutch*, 321.

A suggestion of the reason for directing a writ to the coroner, instead of the sheriff, need not be made upon the roll previously to the writ being issued. *Id.*

Where a defendant is in custody in the county jail at the time a *ca. sa.* directed to the coroner is issued against him, he is sufficiently charged in execution under that writ by its being lodged by the coroner, with his indorsement upon it, with the keeper of the jail. *Id.*

Where an attorney brought an action, and the summons was indorsed, " This writ was issued by *W. Y.* attorney, in person, *of*, &c."—*Held*, that though not strictly according to the form given in the act, it was nevertheless sufficient. *Yardly* v. *Jones*, 332.

A defendant being under terms to plead issuably, rejoin gratis, and take short notice of trial in a country cause, for slander, pleaded on the 19th *Feb.* a special justification, the replication was *de injuriâ*, and the issue was delivered at half-past seven o'clock in the evening of the 27th, with notice of trial for the 3d *March*. The cause was tried as an undefended cause, and a verdict was found for the plaintiff. The Court made absolute a rule for a new trial, on the ground of irregularity, directing the costs to abide the event. *Pound* v. *Penfold*, 323.

The Court refused to discharge an order of a judge, by which time was given to the defendant to rejoin, until after the plaintiff had purged himself from a contempt in the non-payment of interlocutory costs in the cause, although an attachment had been issued for the same contempt, but it had not been executed. *Wenham* v. *Downes*, 324.

Where the trial of a cause came on unexpectedly, and one of the plaintiff's witnesses and both the defendant's counsel were absent, in consequence of which the cause was struck out, the Court enlarged a peremptory undertaking which the plaintiff had given to try the cause, but on the terms of the payment of the costs of the day and of the application. *Saxon* v. *Swaby*, 345.

Rule calling on the directors of an insurance office to deliver up a policy, refused, where they had refused to make good a loss, and the party insured could not declare without it, there being no action pending. *Ex parte Partridge*, 350.

Countermand of notice of trial does not prevent the defendant from having judgment as in case of a nonsuit. *Dennehey* v. *Richardson*, 367.

After having obtained a rule for the costs of the day for not proceeding to trial, the defendant cannot, by Reg. Gen. 69, H. T. 2 W. 4, have judgment as in case of a nonsuit, though no further proceeding has been taken in the cause for four terms. *Palgrave* v. *Justin*, 398.

After allowance of a writ of error the plaintiff in error neglected to transcribe the record within the time limited by Reg. Gen. 10, H. T. 4 W. 4, whereupon the defendant applied to the officer of the Court to sign judgment of *non-pros*, which he was at liberty to do. The officer refused, and then the transcript was removed. The Court below afterwards refused to allow the defendant in error to sign judgment of *non-pros*, *nunc pro tunc*, though the fault was in the officer of the Court. *Pitt* v. *Williams*, 363.

The Court refused to allow an appearance to be entered under the 2 W. 4, c. 39, s. 3, after a *distringas*, on an affidavit which merely stated generally that diligent inquiry had been made to find the defendant, without success. The affidavit should specify the places where, and the persons from whom, the inquiries were made. *Copeland* v. *Neville*, 374.

The copy of the writ of summons must be left on the last of the three times of calling which are required in order to obtain a *distringas*. *Anonymous*, 380.

On a motion against which cause is shown in the first instance, the counsel making the motion has the right to reply, as in an ordinary case. *Gibson* v. *Winter*, 463.

A party who applies by summons to a judge, is not bound to draw up an order according to the minute of the judge made on the hearing of the parties. *Macdougall* v. ——, 462.

Though the effect of a plaintiff recovering a verdict will only be to make him the trustee for the defendant for half the amount recovered, the Court will not stay the proceedings in such action on the payment of the other half of the sum sought to be recovered, but will leave the defendant to his remedy in equity. *Barlow and Wife* v. *Leeds*, 479.

A promissory note was given by a brother to his two sisters jointly for 100*l.*, each of them having separately lent him 50*l.* One of the sisters married, and the other died; and the brother took out administration to the effects of the deceased sister. An action was brought against him for the whole amount by the surviving sister and her husband:—*Held*, that the Court could not, in the exercise of an equitable jurisdiction, stay the proceedings upon payment into Court of 50*l.* *Id.*

Since the rule of H. T. 4 W. 4, No. 15, it is not necessary to set out in the issue and *Nisi Prius* record, a previous plea in abatement and judgment of *respondeat ouster* thereon; the omission to do so is no ground for setting aside a verdict or arresting the judgment, even where the issue had been refused by the defendant on that ground. *Pepper* v. *Whalley*, 480.

A plaintiff may not, since the passing of the Uniformity of Process Act, sue out *bailable* process against two and declare against one only. *Carson* v. *Dowding*, 507.

The Court will not grant a *distringas* where the three calls have been all made on the same day. *Cross* v. *Wilkins*, 516.

The writ of summons was in an action "on promises," and those words were omitted in the declaration, but which appeared a good declaration in *assumpsit*:—*Held*, not to be an irregularity. *Straughan* v. *Buckle*, 519.

A copy of a writ of summons was served on a person by a wrong name:—*Held*, that he was not bound to make application to set it aside. *Hinton* v. *Stevens*, 521.

A notice of declaration, in which he was rightly named, being afterwards served:—*Held*, he was bound to apply to a judge at chambers within four days. *Id.*

A *Sunday* not being either the first or last, is to be reckoned one of the four days. *Id.*

A rule for judgment as in case of a nonsuit having been served more than seven years after the plaintiff's default on the *London* agent of the plaintiff's attorney, who had ceased to act for him, and knew nothing either of him or of the plaintiff, the Court refused to make the rule absolute, but enlarged it, so as to give the defendant time to serve it on some other person, no delay in the trial being thereby incurred. *Curtis* v. *Tabram*, 523.

Distringas granted though two of the calls made were not according to previous appointment. *Hickman* v. *Dallimore*, 524.

Tufton-street, in the county of *Middlesex*, is a sufficient description of a defendant in a writ of summons. *Cooper* v. *Wheale*, 525.

Where a rule has been discharged in the *Bail Court*, that fact is an answer to a similar application in the full Court, though there may be new facts stated in the affidavit, if they might have been brought before the Court on the first occasion. *Rossett* v. *Hartley*, 581.

Where at the trial of an action the judge suggests the withdrawal of a juror, and the plaintiff acts on the suggestion, the Court will stay the proceedings in a second action commenced by the same plaintiff for the same cause, even where on the first occasion he conducted the case in person. *Moscati* v. *Lawson*, 572.

It is no excuse for the delay of a whole term, on a motion to set aside an order of a judge, that a person had been ill and unable to leave his house to make an affidavit. *Octon* v. *France*, 672.

A motion to set aside a writ of summons for irregularity must be made within four days. *Chubb* v. *Nicholson*, 666.

On a sham plea being pleaded, the Court will not give the plaintiff leave to sign judgment as for want of a plea. *Cowper and another* v. *Jones*, 642.

Issue having been joined in *Trinity* Term in a country cause, and no notice of trial given for the next assizes, the defendant cannot move for judgment as in case of a nonsuit until after the following Spring Assizes. *Douglas* v. *Winn*, 662.

After several defaults in trying a cause the Court will enlarge a peremptory undertaking on the terms of the plaintiff paying the costs of the day. *Dennehaye* v. *Richardson*, 653.

A rule for judgment as in case of a nonsuit may be granted, though eight years have elapsed since the default of the plaintiff. *Curtis* v. *Tabram*, 645.

The Court has no power to call on the assignees of an attorney who has become bankrupt, to deliver up title-deeds of a client which have come into their possession under the fiat. *Ex parte Roy*, 669.

The sum indorsed on the writ being above 20*l.*, but the sum claimed by the particulars being less, the Court will not discharge a rule for judgment as in case of a nonsuit on an undertaking to try before the sheriff. *Frodsham* v. *Round*, 667.

A rule for the consolidation of several actions against the underwriters on the same policy may be obtained before declaration. *Hollingsworth* v. *Collinson*, 691.

After judgment of *non-pros*, a rule for the defendant to take out money deposited in lieu of bail is *nisi* only. *Wild* v. *Rickman*, 670.

On the same motion the Court granted leave to

stick up a rule *nisi* to compute and afterwards the rule absolute in the K. B. Office. *Broom* v. *Stittle*, 672.

PRESUMPTION.

In all questions upon the existence of life at a particular time, the presumption in favour of life must be governed, and the weight that is to be attached to it, regulated by the circumstances of each particular case; and the determination of the question is for a jury or the sessions. *Rex* v. *Harborne*, 36.

The sessions were justified in presuming that a first wife was alive at the time of a second marriage of the husband, on evidence being given of a letter from her dated at Van Dieman's Land twenty-five days before the time of the second marriage. *Id.*

PRISONER.—See INSOLVENT.

PROBATE.—See ECCLESIASTICAL LAW.

PROHIBITION.—See ECCLESIASTICAL LAW.

Several pleas may now be pleaded in an action of prohibition. *Hall* v. *Maule*, 583.

QUARE IMPEDIT.—See PLEADING.

RATE.—See JUSTICES. MANDAMUS. POOR.

A sewer-rate was imposed upon certain public offices in *Somerset House*, and its amount levied upon the goods of a person who had an office in that building, to which he repaired every day for the purpose of transacting business, but in which he did not reside. *Somerset House* is drained by sewers of its own, but derives an indirect benefit from the general drainage of the neighbourhood. The officer was treated as an occupier, and held to be properly made liable to the rate required for the support of the sewers, and the Court would not inquire into the question of the amount of the benefit. *Soady* v. *Wilson*, 256.

If commissioners of sewers have jurisdiction to rate a particular district, the Court will not minutely inquire into the way in which they have exercised that jurisdiction. *Id.*

REAL ACTION.—See PRACTICE.

REPLEVIN.—See COSTS. LANDLORD AND TENANT.

REQUESTS, COURT OF.

Where a verdict was given for 2*l.* 8*s.* 6*d.* for goods sold, after deducting 4*l.* 19*s.* 6*d.* for tuition and money payments:—*Held*, that the claim was a balance of an account on demand originally exceeding 5*l.* within 47 Geo. 3, sess. 1, c. 4, s. 4, (Blackheath Act); and therefore that no suggestion to deprive the plaintiff of costs could be entered. *Moreau* v. *Hicks*, 87.

Where a Court of Requests Act applies to defendants residing within the jurisdiction, the affidavit of a defendant applying to enter a suggestion to deprive the plaintiff of costs, ought to show that the defendant was residing there at the time of action brought, as well as merely describing him as resident there at the time of affidavit sworn. *Id.*

If a defendant, liable to be sued in the Westminster Court of Requests, omits to plead the Statute (23 G. 2, c. 27,) in bar of a suit in a superior Court, or to apply for a nonsuit at the trial, on the ground that the claim is less than 40*s.*, the Court will not after verdict enter a suggestion to deprive the plaintiff of his costs. *Clark* v. *Hamlet*, 177.

SALE.—See AGENT.

A signature by an auctioneer's clerk, in the character of witness merely to a contract for the sale of property, which is signed by the purchaser alone, is not a sufficient signing of an agreement or memorandum, or note thereof, by an agent of the seller, to satisfy the Statute of Frauds. *Gosbell* v. *Archer*, 31.

Quære, whether it would have been sufficient, even if the document had shown upon the face of it, that the clerk had knowledge of its contents? *Id.*

The receipt of deposit money by an auctioneer's clerk, which was paid over to the seller, and a letter from the solicitors of the seller admitting that no title could be made, and offering to relinquish the purchase, and pay the charges of investigating the title, do not amount to a ratification of an imperfect contract for the sale of property by auction, which was only signed by the purchaser and the auctioneer's clerk in the character of witness, so as to satisfy the Statute of Frauds; for the receipt of the money is a transaction distinct from the power to contract, and is within the ordinary scope of the clerk's duty; and the latter, not containing any of the terms of the contract, cannot be connected with what had been previously done, without resorting to parol evidence. *Id.*

The owner of chattels stolen, who prosecutes the thief to conviction, may recover their value in trover from a person who purchased them from the thief by a *bonâ fide* sale, but not in market overt, and sold them again in market overt before the conviction, notice of the felony having been

given whilst they were in his possession. *Peer* v. *Humphrey*, 28.

Upon a sale of an interest in land by auction, the vendee signed a contract on the back of the printed particulars of sale which contained the conditions; but there was no signature by the vendors or by any one authorized by them:—*Held*, that a subsequent letter written by one of the vendors, in which he spoke of the sale as "our sale to the vendee," and referred to the conditions, was, coupled with the contract, sufficient to satisfy the Statute of Frauds. *Dobell* v. *Hutchinson and Holdsworth*, 394.

Particulars of the sale by auction of a public-house, described the premises as being held for an unexpired term of years at a rent of 55*l.*; and as comprising, amongst other things, a yard. By the conditions the contract was to be completed on the 25th *June*, and any error or mistake in the description of the property was to be matter of compensation, to be fixed by arbitration. In fact the yard was not held under the lease, but under a tenancy from year to year, at a further rent of 10*l.*; the vendors, however, procured a lease for the same term of the yard, at an additional rent of 8*l.*, dated on 23d *June*, but not, in fact, executed until long after the 25th *June*. The yard was essential to the enjoyment of the premises:—*Held*, that this defect was not matter of compensation under the terms of the condition; but such a defect in title as justified the vendee in vacating the contract. *Id.*

By the custom of trade in *Liverpool* the transfer of a delivery order from the vendor to the vendee of the goods enables the latter to go into the market and dispose of such goods. In a case where the vendee had thus disposed of part which had been delivered according to his order, and he then became bankrupt, the rest of the goods remaining in the warehouse of the vendor:—*Held*, that the latter was entitled to retain them; the giving of the delivery order not operating, as between the original vendor and vendee, as a complete transfer of the goods. *Townley* v. *Crump*, 584.

Goods under such circumstances are not in the order and disposition of the bankrupt vendee at the time of his bankruptcy, within the operation of 6 Geo. 4, c. 16, s. 72. *Id.*

A person devised specific property to his son, and other specific property to his daughters as tenants in common. The several devisees agreed to a sale, and both properties were sold to one person in several lots, partly by auction and partly by private contract, but each sale was subject, amongst others, to a condition "that in case the purchaser should be let into possession before the payment of the purchase-money, he should be considered as tenant at will to the vendors, and pay interest after the rate of 4*l.* per cent. per annum on the amount of the purchase-money, as and for rent. The defendant was let into possession:—*Held*, that such sale was a separate and distinct contract, and that a count stating it as one entire contract with the devisees jointly for the whole property, was bad:—*Held*, also, the devisees, having separate interests, could not maintain a joint action for use and occupation, on the mere fact of the defendant having been let into possession. *Quære*, whether in such a case use and occupation is maintainable at all. Per *Littledale*, J. *Seaton* v. *Booth*, 742.

SCIRE FACIAS.—See AMENDMENT. PLEADING. WARRANT OF ATTORNEY.

The Court will not grant a rule absolute in the first instance to quash a *scire facias* on payment of costs for irregularity, on the motion of the party who sued it out. *Ade* v. *Stubbs*, 520.

SEA.

A custom for the inhabitants of a parish to take from a private close, which adjoins the sea, sand drifted there, for manure, amounts to a custom to take profits *in alieno solo*, and is bad. *Blewitt* v. *Tregonning*, 431.

Such a right cannot be claimed by custom. *Id.*

SECURITY FOR COSTS.—See COSTS.

SESSIONS.—See MANDAMUS. POOR. WAY.

Where by the practice of the sessions eight days' notice of appeal was required at the first sessions, against an order of removal, but fourteen days' notice of an adjourned appeal, and an appeal was dismissed for want of sufficient notice for the adjourned sessions, the Court refused to interfere with the practice. *Rex* v. *The Justices of Monmouthshire*, 111.

A notice of an intended application to the sessions, under 4 & 5 W. 4, c. 76, s. 73, for an order on the putative father of a bastard child, must be given under the hands of the overseers or guardians: it lies upon them to show that proper notice was given, and the objection is not waived, though the father appears at the sessions, and takes an objection to its being the *next* sessions, and does not produce the original notice served upon him. *The King* v. *The Justices of Carnarvonshire*, 324.

By 1 & 2 W. 4, c. 34, s. 45, (the Game Act), an appeal is given to the sessions against any conviction under it, to any person aggrieved by such conviction, provided he give to the complainant within a certain time a notice in writing of such appeal and of the cause and nature thereof:—*Held*, that the sessions had no power to adjudicate on a matter not stated in the notice; and

that they could not therefore quash a conviction for want of form, after a notice of appeal which only stated grounds of objection on the merits. *Rex* v. *Boulibee*, 713.

SET-OFF.

The Court will not order costs due from one party to another to be set off against a sum obtained from the former by the latter, to obtain his liberation from an illegal arrest, but ordered by the Court to be repaid. *Pitt* v. *Combs*, 13.

SHERIFF.

See BANKRUPT. EXECUTION. INTERPLEADER. PRACTICE. REPLEVIN.

A mere request by a plaintiff to a sheriff to issue his warrant on a *fi. fa.* to a particular individual amongst his officers, does not make him a special bailiff so as to make him the plaintiff's agent. *Balson* v. *Meggatt*, 659.

The Court will not restrain a sheriff from selling goods seized under a *fi. fa.* at the instance of a person who claims the goods as his property. *Harrison* v. *Forster*, 650.

In applying for an attachment against the sheriff for an insufficient return to a writ, the return must be brought before the Court by an office copy verified by affidavit. *Wilton* v. *Chambers*, 582.

A sheriff is not bound to do execution upon a criminal convicted in his county, if such criminal is not in his custody; unless the Court, by a special mandate, direct the party who has the criminal in custody, to deliver him to the sheriff, and order the sheriff to receive the prisoner and execute him. *Rex* v. *Antrobus*, 106.

On a question whether by custom a sheriff of a county is exempt from the duty of executing criminals convicted in his county, evidence of reputation is not receivable. *Id.*

Nor is such evidence admissible, that by custom the sheriffs of a city are bound to execute. *Id.*

On the trial of an information against a sheriff of a county for refusing to execute a criminal, a warrant to a former sheriff of the same county, commanding him to gibbet an offender, and a craving by that sheriff of an allowance from the Exchequer for his expenses on that account, are receivable in evidence. *Id.*

Quære, whether the calendar signed by the judge of assize can be received in evidence against a sheriff, without notice to produce the copy served on him by the clerk of the peace. *Id.*

Where a sheriff has paid to the plaintiff in an action the debt and costs under an attachment; the sheriff has no right to retain the defendant in custody until he is repaid. *Rimmer* v. *Turner*, 193.

Delivery of an attachment against a sheriff to the managing clerk of the *London* agent of the coroner, is not sufficient to allow of an attachment issuing against the coroner for not returning the attachment. *Fever* v. *Aubin*, 332.

A return of *cepi corpus*, coupled with evidence of an answer received at a sheriff's office, that no bail-bond was executed, is evidence to go to the jury in an action against the sheriff for an escape. *Neck* v. *Humphrey*, 419.

SHIP.

A ship was hired by government to take out convicts to *Van Dieman's Land*. From that place it sailed to *Batavia*, and on several other trading voyages. It sailed on the homeward voyage to *England*, and arrived safe at *St. Helena*, but was lost before arrival at the port of discharge, and all on board perished:—*Held*, that proof of these facts, and of a seaman having gone on board the ship in *England*, and having been seen working on board at *Van Dieman's Land*, at *Batavia*, and afterwards at *St. Helena*, was sufficient to go to the jury, as evidence to entitle the seaman to wages *pro rata* for the voyage out. *Harris* v. *Ive*, 238.

SLANDER.—See COSTS.

In an action for slander of an attorney, the judge nonsuited the plaintiff on the ground that the words were mere general abuse, and not of and concerning him in his professional character; and it was not insisted on at the trial that the question ought to be submitted to the jury; the Court refused to set aside the nonsuit and grant a new trial. *Tomlinson* v. *Brittlebank*, 573.

SPEAKER'S CERTIFICATE.

See PARLIAMENT.

STAMP.—See APPRENTICE. POOR.

A mortgage for years was given, before the passing of 3 G. 4, c. 117, to secure the payment of 150*l.* After the passing of that act, the mortgagor and mortgagee joined in a conveyance in fee to a new mortgagee for 350*l.* The latter deed consisted of four skins, and had a 1*l.* 15*s.* stamp on the first, a stamp of 2*l.* on the second, of 2*l.* on the third, and of 1*l.* on the fourth:—*Held*, that these stamps were sufficient, and that such a mortgage is a transfer of the old mortgage as to the original sum, and a new mortgage as to the further sum advanced, within the meaning of the 3 G. 4. *Doe* d. *Bartley* v. *Gray*, 235.

An architect employed on a work at a certain *per centage* commission, by deed assigned to a

creditor all the commission to which he was then or might thereafter be entitled, upon trust to pay a certain other debt to another creditor, and to retain the residue towards satisfaction of his own debt. The deed contained a power of attorney, and covenants to pay the debt, not to receive the commission or revoke the power of attorney, or do any act to hinder the creditor from receiving the commission, and the usual covenants for title:—*Held*, that the deed was an absolute conveyance of the commission-money and not a mortgage:—*Held*, also, that a conveyance stamp applicable to the sum actually received on account of the commission-money was sufficient. *Pooley* v. *Goodwin*, 567.

The defendant, by a lease which was not stamped, demised to *J. W.* He afterwards, by an agreement stamped with a lease stamp, but which did not contain words of demise, though it referred to the lease, let the same premises to the plaintiff:—*Held*, that the terms of the lease were incorporated in, and formed part of the agreement; and that the former was admissible in evidence though it was not stamped:—*Held*, also, that both together amounted to a lease at a specific rent, for which the defendant had a right to distrain. *Pearce* v. *Cheslyn*, 768.

STATUTE.

A Railway Act (7 G. 4, c. 49, *Manchester* and *Liverpool* Railway,) directed compensation to be assessed for damage sustained "by any owner or occupier of, or person interested in lands, tenements, or hereditaments, by reason of the making of the railway:—*Held*, that an assignee of a beneficial lease had no right to claim compensation in respect of a probable chance which he had of having his lease renewed at the end of the term, in consequence of a promise made by his lessor to that effect. *Rex* v. *The Manchester and Liverpool Railway Company*, 689.

STATUTE OF FRAUDS.

See GUARANTEE. SALE.

STOLEN GOODS.

See SALE.

TAXES.

The demand required by 43 G. 3, c. 99, s. 33, previously to a distress being levied for assessed taxes, need not be made in writing or personally on the party from whom they are due: it is sufficient if a demand has in fact been made, and there has been a refusal on the ground of inability to pay, or for any other cause. *Rex* v. *Ford*, 46.

TENANTS IN COMMON.

See LANDLORD AND TENANT.

TRANSIT.

—See SALE.

TRESPASS.

—See PLEADING.

Where there are a series of matters complained of in trespass, and the plea amounts to a justification of all; in order to entitle the defendant to a verdict, it is incumbent upon him to make out all the material allegations in his plea; therefore, where the declaration complained of an assault, putting the plaintiff out of a shop, and imprisoning him in custody of a police-officer, and the plea was *molliter manus imposuit* to remove the plaintiff from the defendant's shop, and a justification of the imprisonment because the plaintiff had assaulted the defendant, and the assault on the defendant was not proved:—*Held*, that although without it the first part of the plea was sustainable, yet being a material allegation to maintain the plea as to the imprisonment, it was necessary to prove it to entitle the defendant to a verdict. *Reece* v. *Taylor*, 15.

Semble, that it is not necessary to reply excess in every case where the allegations in a declaration in trespass are covered by a plea of justification; but that evidence of acts consistent with the declaration, but not within the justification, may be given under *de injuriâ*. *Id.*

TROVER.

—See INTERPLEADER. PLEADING.

To support a plea of the Statute of Limitations in trover, by showing a conversion more than six years before the action brought, the defendant must either prove an actual conversion in fact, or give evidence of a positive and absolute demand and refusal before that period. *Philpott* v. *Kelly*, 134.

The demand and refusal necessary to afford evidence of a conversion in trover, must be absolute and unqualified. *Id.*

A pipe of wine belonging to the plaintiff was deposited in the defendant's cellar, and was bottled at a time during which there were conflicting claims to it by the plaintiff and the assignees of the party to whom it was sent, and who resided in the defendant's house; by whom, or by whose orders the wine was bottled did not appear, though there was some evidence that it was likely to be injured from not being bottled:—*Held*, that it was a question for the jury, whether the act of bottling operated as a conversion: *Held*, also, that it was a question for a jury to say, under all the circumstances, whether the drinking of a part of the wine, taken in connection with the bottling, amounted to a conversion; and they having found that it did not, the Court refused to disturb the verdict. *Id.*

The mere taking away and destroying a part of property which is in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to enable the party entitled to main-

tain trover for the whole. *Per Patteson*, J. and *Coleridge*, J. *Philpott* v. *Kelly*, 134.

A bankrupt, before his bankruptcy, contracted to build a ship for the plaintiffs, according to the terms of an agreement, by which the price was to be paid by instalments at specific periods, as the building proceeded, and the work was to be done under the superintendence of a person appointed by the plaintiffs. The work proceeded, and two of the instalments became due and were paid, and a sum was paid by anticipation on account of the third instalment to the bankrupt before his bankruptcy. The assignees proceeded with the ship after the bankruptcy, and the plaintiffs tendered to them the remaining instalments, according to the agreement:—*Held*, that the plaintiffs might maintain trover against the assignees for the ship, when completed. *Clark and another* v. *Spencer and another*, 760.

As soon as any of the materials had been approved of by the superintendent, and used in the progress of the work, the fabric, consisting of such materials, was appropriated to the purchaser; and as soon as the last of the necessary materials was approved and added to the ship, the fabric was complete, and the general property vested in the purchaser. The payment of the instalments specifically appropriated the very ship in progress. *Id.*

The ship was not, under the circumstances, in the order and disposition of the bankrupt, within the 6 G. 4, c. 16, s. 72. *Id.*

TRUSTEE.—See ACTION.

UNIVERSITY.

A party was arrested under a warrant from the Chancellor of the University of *Oxford*, out of the precincts of the University. He was brought up into this Court by *habeas corpus cum causâ*:—*Held*, on a rule for discharging him out of custody, that to justify the arrest it must be shown, either on affidavit or by the return to the *habeas*, that he was a resident member of the University at the time of the commencement of the suit. *Perrin* v. *West*, 401.

Quere, whether an arrest can be made under a warrant from the Chancellor of the University of *Oxford* beyond the precincts of the University. *Id.*

USE AND OCCUPATION.

Where there was an agreement in writing, but not under seal, to let a messuage, together with full and free and exclusive licence and leave to hunt, hawk, course, shoot, and sport over a manor, and the tenant entered and was possessed during the term granted:—*Held*, in assumpsit on the agreement for the rent on demurrer to a plea, that not being by deed the agreement was void, because an incorporeal hereditament was agreed to be let, that the plaintiff was not entitled to recover in respect of the actual enjoyment of the premises let by the defendant, of which he had taken possession. *Bird* v. *Higginson*, 61.

Where there has been an actual enjoyment, assumpsit for use and occupation lies in respect of incorporeal hereditaments. *Id.*

Use and occupation cannot be maintained by the lessor of a tenancy from year to year against the trustees under a deed of assignment for the benefit of creditors, upon an occupation by them for the purpose of disposing of the insolvent's property, unless they have actually occupied as tenants. *How* v. *Kennett and Gough*, 391.

The question whether the acts of the trustees show an intention to become tenants, which was acted upon by the lessor, is a question for the jury. *Id.*

It is no misdirection in such a case to submit the case upon all the facts to the jury to say whether the acts of the trustees amounted to a contract to become tenants of the premises, that is, whether they meant to become tenants, or if not, whether they so acted as that the lessor was induced to believe and did believe that they meant to become his tenants. *Id.*

USURY.

In a declaration for usury, the day from which the forbearance is to commence must be alleged, and proved precisely as stated, although laid under a *videlicet*; and if a different day is proved, or no day at all is proved, it is not sufficient. *Fox* v. *Keeling*, 66.

Where usurious interest was alleged to have been taken on the renewal of a bill, and the contract to forbear and the forbearance were alleged to have been from the time of making the agreement for renewal until the second bill became due, but no evidence was given of any precise day on which the transaction took place:—*Held*, that the usury was not sufficiently made out. *Id.*

VAGRANT.

Under the 5 Geo. 4, c. 83, s. 14, (Vagrant Act,) a subsequent Court of Quarter Sessions have power to give effect to a judgment pronounced at a previous sessions of the same Court, by issuing process of execution upon a conviction as awarded at such previous sessions. *Rex* v. *The Justices of Warwickshire*, 18.

A *mandamus* to the Court of Quarter Sessions will go, commanding them to issue such process of execution where there has been no delay in making the application, or the delay has been satisfactorily accounted for. *Rex* v. *The Justices of Warwickshire*, 18.

VARIANCE.—See EVIDENCE. PLEADING.

VENDOR AND PURCHASER.—See SALE.

VENUE.—See PRACTICE.

VOLUNTEER.—See POOR.

WARRANT.

A collector of taxes may distrain without having his warrant with him. *Rex* v. *Clarke*, 252.

WARRANT OF ATTORNEY.

Judgment allowed to be signed on a warrant of attorney, on an affidavit that the defendant had been seen alive within ten days. *Krell* v. *Joy*, 670.

Judgment allowed to be signed on a warrant of attorney, where letters had been recently received from the defendant from a distance, the hand-writing of which was sworn to. *Gray* v. *Withers*, 659.

Where the defeasance to a warrant of attorney requires any thing to be done on demand, before judgment can be entered up, there must be an actual demand upon a person capable of giving a substantial answer; therefore a demand made upon an insane person is not sufficient to authorize the judgment to be entered up. The only remedy is by an application to equity. *Capper* v. *Dando*, 11.

A warrant of attorney was given by the defendant to the plaintiff on the 5th of *June*, 1824. The defeasance was to secure the payment of money on the 5th *Dec.* 1826; and it was stated that it was agreed that the plaintiff should enter up judgment thereon at his pleasure. Judgment was signed on 27th *May*, 1825:—*Held*, that no *scire facias* was necessary to revive the judgment previously to issuing execution in *Feb.* 1827. *Hiscocks* v. *Kemp*, 384.

Where a defendant was seen alive on 23d of *April*, and a motion to enter up judgment on a warrant of attorney was made on the 27th of *May*, it was granted. *Watts* v. *Bury*, 371.

It is no objection to entering up judgment on a warrant of attorney, that the defendant, since the execution of it, had become insane. *Piggott* v. *Killick*, 518.

Leave granted to enter up judgment on a warrant of attorney where one of three plaintiffs was dead. *Harper* v. *Jackson*, 214.

The Court refused to enter up judgment on a warrant of attorney where the attesting witness, an attorney of the Court, refused from malice to make the necessary affidavit. *Mille* v. *M'Donoughoo*, 184.

WARRANTY.

Where a horse has been sold under a warranty of soundness, the seller is liable to an action on the warranty, if the horse is not sound at the time of sale, though the horse is not returned, and though the buyer suffer a considerable time to elapse before he complains of the unsoundness, or offers to return the horse. *Patteshall* v. *Tranter*, 178.

On a sale of pictures a bill of parcels of four pictures was given, stating them to be Views in *Venice*, and having the word "*Canaletti*:"—*Held*, that this was evidence to go to the jury of a warranty that they were painted by that artist; and that it was a correct direction to the jury, to desire them to consider whether the defendant intended so to warrant the pictures, or only to express his opinion on the subject of the artist by whom they were painted. *Power* v. *Barham*, 683.

WATERCOURSE.

Since the rule H. T. 4 W. 4, the general issue in case for diversion of watercourse, puts in issue the mere fact of diversion by the defendant, and admits the right in respect of which the plaintiff sues; and the word "wrongfully" in the declaration has not the effect of putting the right in issue. *Frankum* v. *Earl of Falmouth*, 1.

WAY.

The finding that a way is unnecessary upon the view of the justices, is sufficiently stated in an order made under the 55 G. 3, c. 68, s. 2, for stopping up the way in these terms: "We, &c., having upon view found, &c." *Rex* v. *Justices of Cambridgeshire*, 600.

The view must be taken by the justices concurrently at the time of making the order. *Id.*

But it is no objection that at the view no way in fact existed, it having been previously stopped up by the owner of the adjoining land without legal authority. *Id.*

It is sufficient if such an order only contains the words "for the full value thereof" at the end, without having them as well after the direction to sell to the owner of the adjoining land

if he shall be willing to purchase, as in the schedule No. 18, in the 13 G. 3, c. 78. *Rex* v. *Justices of Cambridgeshire*, 600.

It is no objection that the order does not contain any certificate of the sale, or direction for the application of the purchase-money, that requisition of the 13 G. 3 being repealed by the 55 G. 3. *Id.*

It is no objection that, at the time of the order, the owner of the adjoining land, to whom the sale is to be made if he is willing, is himself the surveyor. *Id.*

The justices have jurisdiction to stop up an unnecessary way, if there be a right of way, although there be no actual way. *Id.*

Quære, whether, on a motion for a *certiorari*, to bring up an order of sessions confirming an order of justices for stopping up a way, the Court can entertain objections to the order which are not apparent on the face of it, though the object be to show a want of jurisdiction. *Id.*

Where by an act of parliament trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public: therefore, where a portion only of the road is completed, the parish in which that portion is situated is not bound to repair it, although it has been used by the public, to whom it is of great utility, and has been before many times repaired by the parish. *Rex* v. *Edge Lane*, 737.

It is the same thing where the road is made under the authority of subsequent acts of parliament, having distinct provisions and enactments for separate portions of the road, if it appears that the one common object of them all was to make one continuous line of road. *Id.*

Power was given by a local act to commissioners of inclosure to divide, alter, turn, or stop up roads, and "all roads which should not be set out or finally ordered and directed to be set out and continued as aforesaid, should be for ever stopped up and extinguished, and should be deemed and taken as part of the lands and grounds to be divided and allotted." Provided, "that no roads passing or leading through any of the old inclosures should be stopped up, diverted, turned, or in any other way altered, without an order for that purpose under the hands and seals of two justices:"—*Held*, that a footway and a highway passing through old inclosures were not stopped up by the operation of the award, in which they were not set out and continued, there being no order of justices for the purpose:—*Held*, also, that highways passing over waste land and running into the highway above-mentioned, were also not stopped up by the effect of the award. *Rex* v. *The Marquis of Downshire*, 672.

An order of justices made under the above proviso, stated that the justices having particularly viewed the public roads, and being satisfied that the highways, &c., intended to remain and be the public highways, &c., in future, had been continued or have been set out or properly found, and made safe and convenient, and that the roads and footway thereinafter described were unnecessary to be continued, did order them to be stopped up and extinguished:—*Held*, that the order did not sufficiently show that the proceeding took place on the view of the justices; and therefore that the roads were not in point of law extinguished:—*Held*, also, that the roads leading into them were also not stopped up by the order. *Id.*

Issue joined on a general traverse under 2 and 3 Will. 4, c. 71, of a right of way enjoyed as of right for forty years:—*Held*, that evidence of a parol agreement for permission to use the way on payment of a sum of money, made within the forty years, was admissible on this issue. *Tickle* v. *Brown*, 769.

A deed or agreement in writing, showing the origin of a right claimed, need only be specially pleaded under 2 and 3 Will. 4, c. 71, s. 5, when the deed or agreement was made before the commencement of the period of years for which the right is claimed. *Id.*

The notice of appeal required by 55 Geo. 3, c. 68, s. 3, against an order for stopping up a highway, sufficiently shows the party giving it to be the party aggrieved by the order, if it states that he will be materially injured and aggrieved by being compelled to go a much greater distance to the next market town from his residence than he would if the road were put and kept in a state of repair. *Rex* v. *William Adey*, 42.

A charter granted by the Crown, exempting the tenants of the demesne lands in a certain manor from the payment of *chimagium* or road money, is no excuse for the non-performance of statute duty on the highways. *Rex* v. *Siviter*, 376.

WITNESS.

On a rule for an attachment for not obeying a subpœna to attend as a witness, it must appear that the party was called in Court *on his subpœna*. It is sufficient excuse that he was too ill to attend. *In re Jacobs*, 123.

On a motion for an attachment against a witness for not obeying a subpœna:—*Held*, no excuse that the witness would have been in time, if a previous cause on the list had not unexpectedly gone off. Nor that another person had answered for him, and would have fetched him in a few minutes. *In re Fenn*, 200.

A rule *nisi* was granted for a *habeas corpus ad testificandum* to bring up a prisoner, in custody on the commitment of a magistrate, to give evidence before an election committee of the House of

Commons; but the Court intimated doubts as to the power of making it absolute. *In re John Pilgrim*, 319.

The Court has no power to compel a person to appear and give evidence before the Master. *M'Dougal* v. *Nichol*, 341.

A commission to examine witnesses abroad may be granted under the 1 W. 4, c. 22, without the usual clause requiring the commissioners to take an oath, if circumstances be shown which make it appear that the commission will be inoperative unless that clause be omitted. *Clay* v. *Stephenson*, 409.

WRIT.—See PRACTICE.

WRIT OF RIGHT.—See PRACTICE.

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